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R. Perry Sentell Jr.

"OFFICIAL IMMUNITY" IN LOCAL GOVERNMENT LAW: A QUANTIFIABLE CONFRONTATION

R. Perry Sentell, Jr.*

INTRODUCTION

The local government can operate, of course, only through its officers, agents, and employees. Inevitably, negligence on the part of those actors occasionally results in injury or damage to others. When the disgruntled party seeks recovery from the local government itself, he frequently finds his effort thwarted by the ancient doctrine of "sovereign" (or "governmental") immunity.[1] In anticipation of that result, therefore, plaintiff may bring a complaint directly against the erring officer or employee, or at least may add that actor as an additional defendant. Plaintiff's obvious hope is that the negligent actor can be held liable, even when his principal or employer cannot.

In early English law that hope materialized: the officer or employee was forced to compensate for negligent acts done in the service of his governmental principal or employer.[2] That result, according to American scholars, was misguided: it operated as "an inverted pyramid" imposing liability upon "the financially weakest link in the chain," and "will often inhibit objective and fearless action

* Carter Professor of Law Emeritus, University of Georgia. Member, State Bar of Georgia.

1. For treatments of the local government's sovereign or governmental immunity, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA (4th ed. 1988); R. PERRY SENTELL, JR., GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF MONELL: SECTION 1983 AND THE "NEW" PERSONS (1984); R. Perry Sentell, Jr., *Claims Against Counties: The Difference a Year Makes*, 36 MERCER L. REV. 1 (1984); R. Perry Sentell, Jr., *Georgia County Liability: Nuisance or Not?*, 43 MERCER L. REV. 1 (1991); R. Perry Sentell, Jr., *Georgia Municipal Tort Liability: Ante Litem Notice*, 4 GA. L. REV. 134 (1969); R. Perry Sentell, Jr., *Local Government and Constitutional Torts: In the Georgia Courts*, 49 MERCER L. REV. 1 (1997); R. Perry Sentell, Jr., *Local Government Liability: The "Crises" Conundrum*, 2 GA. ST. U. L. REV. 19 (1986); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

2. For discussion, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights For Their Wrongs*, 13 GA. L. REV. 747, 747 (1979).

and discourage responsible men from taking public employment."[3] Reflecting such concerns, legal development eventually evolved various limitations upon the officer's personal liability. One of those limitations locked upon the concept of "official immunity," a concept rich in both semantics and substance.[4]

Official immunity reflects a somewhat ambiguous history, and its future, of course, bodes unforeseeable. Presently, however, the concept stands as a predominant confrontational issue in Georgia local government litigation. An effort at quantifying that litigation's inefficiency might prove beneficial to both bar and bench.

Part I of this Article provides a brief background of the evolution of official immunity law in Georgia.[5] Part II examines the eight cases dealing with the concept of official immunity heard and decided by the Georgia Supreme Court from 1994 to 2004.[6] Finally, Part III provides a survey of the official immunity cases heard by the Georgia Court of Appeals from 1994 to 2004, as well as a synopsis of the state of official immunity law based on those cases.[7]

I. BACKGROUND

In early Georgia law, the local government officer's personal liability experienced a case-by-case evolution. Consequently, a patchwork of statutes and court decisions assured a sentiment for virtually every taste. This evolution combined with companion notions of liability insurance, indemnity, and the official bond to comprise an amorphous legal framework.[8] The amalgamation served, nevertheless, as the law's erratic response to the issue for roughly a century.

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3. Fleming James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 639 (1955).

4. For discussion, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights For Their Wrongs*, 13 GA. L. REV. 747, 747 (1979).

5. *See infra* Part I.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See* Sentell, *supra* note 4, at 803.

In 1980 the Georgia Supreme Court seized undisputed control of the matter with its epic decision in *Hennessy v. Webb*.[9] Under *Hennessy*, the officer's personal liability for negligence turned upon the complexion of his conduct.[10] For "ministerial" functions, the officer's negligence yielded legal responsibility; for negligently performed "discretionary" functions, in contrast, the officer enjoyed immunity.[11] The appellate courts struck and re-struck this ministerial-discretionary balance with a confusing vengeance for roughly the next decade.[12] Indeed, perhaps it was the "hiatus of *Hennessy*" that posed the issue as an item for subsequent revisional reflection.

An amendment of January 1, 1991, rendered the official immunity concept a component of the Georgia Constitution:

> [The local government officer] may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, [his] ministerial functions and may be liable for injuries and damages if [he] act[s] with actual malice or with actual intent to cause injury in the performance of [his] official functions.[13]

Thus, the amendment graphically evidenced the imprint of *Hennessy*'s balancing approach to the subject—it appeared to divide the officer's conduct into "ministerial functions" and "official functions."[14] For the former, the provision sanctioned negligence liability; for the latter, it did not.[15] Rather, liability for official

9. 264 S.E.2d 878 (Ga. 1980). The case featured an injured high school student's action against the school principal for a fall allegedly caused by a rug and mat negligently placed at the door of the building. *Id.* at 879.

10. *Id.* at 880.

11. *Id.* at 880. The court reasoned that the charged negligent activity was discretionary, not ministerial, on the part of the principal, and the defendant was entitled to immunity. *Id.* at 880-81.

12. For discussion, see R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27, 35 (1988).

13. GA. CONST. art. I, § 2, para. 9(d) (amended 1991). For treatment of this amendment in the context of both sovereign immunity for the local government and official immunity for the officer or employee, see R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

14. *Id.*

15. *Id.*

functions required "actual malice" or an "actual intent to cause injury."[16]

Somewhat surprisingly, the constitution's new formulation languished tauntingly on the books, bereft of judicial consideration, for almost four years.[17] Finally, in 1994 the Georgia Supreme Court decided *Gilbert v. Richardson*, a motorist's action for injuries suffered when colliding with a county deputy sheriff, alleging the deputy's negligence in responding to an emergency call.[18] Taking explicit notice that it had "not previously considered the effect" of the 1991 amendment upon "official immunity,"[19] the court proceeded to do so:[20] "[T]he 1991 amendment provides no immunity for ministerial acts negligently performed or for ministerial or discretionary acts performed with malice or an intent to injure. It

16. *Id.*

17. The Georgia Court of Appeals decided at least eight cases between the effective date of the 1991 amendment and the supreme court's first interpretation in 1994. Some of those cases arose before and some after the amendment, but none actually applied it. *See* Alford v. Osei-Kwasi, 418 S.E.2d 79, 85 (Ga. Ct. App. 1992) (holding official immunity prevailed where prison inmate sued law enforcement officer); McDay v. City of Atlanta, 420 S.E.2d 75, 77 (Ga. Ct. App. 1992) (finding official immunity prevailed in prisoner's action against police officers); City of Atlanta v. Chambers, 424 S.E.2d 19, 24 (Ga. Ct. App. 1992) (holding official immunity prevailed in injured party's action against public works commissioner); Parker v. Wynn, 438 S.E.2d 147, 149 (Ga. Ct. App. 1993) (finding official immunity prevailed in student's action against school teacher); Schmidt v. Adams, 438 S.E.2d 659, 660 (Ga. Ct. App. 1993) (holding official immunity prevailed in inmate's action against prison physician); Guthrie v. Irons, 439 S.E.2d 732, 736 (Ga. Ct. App. 1993) (finding official immunity prevailed in student's action against principal and teacher); Gilbert v. Richardson, 440 S.E.2d 684, 687 (Ga. Ct. App. 1994) (noting the new amendment but actually applying *Hennessy* and finding official immunity prevailed in motorist's action against a deputy sheriff); McLemore v. City Council of Augusta, 443 S.E.2d 505, 508 (Ga. Ct. App. 1994) (remanding motorist's action against police officer to determine whether the officer was performing a discretionary function).

18. 452 S.E.2d 476 (Ga. 1994). Plaintiff also sued the county sheriff in his official capacity, and the court held that the county's liability insurance had waived the sheriff's immunity as the respondeat superior of the deputy. *Id.* at 477-78. The court was careful to distinguish government immunity or sovereign immunity for the governmental entity, from qualified immunity or official immunity for governmental officers and employees. Thus, "the term 'governmental immunity' is synonymous with sovereign immunity and not an umbrella term encompassing both sovereign and official immunity." *Id.* at 480-81.

19. *Id.* at 483. The court noted that the 1991 amendment was effective on January 1, 1991, and that this action arose on September 1, 1991 and was filed on November 24, 1992. *Id.* at 478.

20. *Gilbert*, 452 S.E.2d at 483. The court emphasized that "[w]ith the passage of the 1991 amendment, the immunity enjoyed by public officers and employees was made part of the State Constitution." *Id.* at 482-83.

does, however, provide immunity for the negligent performance of discretionary acts, which is consistent with prior law."[21]

Putting that interpretation into play, the court characterized the deputy as "acting within the scope of her authority as a law enforcement officer when she rushed to back-up another officer in response to an emergency call."[22] Moreover, the deputy was "exercising discretion when [she] decide[d] to rush to the scene" of the emergency.[23] Accordingly, the deputy "was performing an official discretionary function when the accident occurred and is immune from personal liability under the 1991 amendment."[24]

Via its interpretation of the 1991 amendment, the supreme court made clear that the concept of official immunity had finally attained constitutional status in Georgia local government law.[25] Concurrently, the court's interpretation also brought forward defining principles previously formulated in the case law.[26] For officers and employees sued in their individual (as opposed to official) capacities, official immunity depended upon the nature of the act and the severity of the erring conduct.[27] As for the act itself, the classic set-off remained that of ministerial versus discretionary (despite the amendment's omission of the latter term).[28] For ministerial acts, the officer enjoyed no official immunity (for either negligence or for malice or an intent to injure).[29] For discretionary acts, the officer possessed official immunity for negligence, but not for "malice or an intent to injure."[30]

In 1994, therefore, the supreme court provided its initial interpretation of the 1991 constitutional amendment. *Gilbert v.*

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21. *Id.* at 483 ("This interpretation comports with the purpose of providing immunity from personal liability to government employees who work in positions where they make policy or exercise discretion.").

22. *Id.*

23. *Id.*

24. *Id.* at 483. The court thus affirmed the court of appeals' grant of summary judgment to the deputy. *Gilbert*, 452 S.E.2d at 484.

25. *Id.* at 482-83.

26. *Id.* at 483.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Gilbert*, 452 S.E.2d at 483.

Richardson thus posted the parameters for the judiciary's treatment of official immunity for the following decade.

II. A DECADE OF DECISIONS: THE SUPREME COURT

In perfecting its *Gilbert* analysis, the Georgia Supreme Court decided a total of eight important cases over the next ten years. Those decisions touched several of the formulation's pivotal points. In *Seay v. Cleveland*, the court reemphasized official immunity's restriction to cases in which the officer is sued in his individual or personal capacity.[31] Accordingly, a county sheriff, sued in his official capacity for negligence in conducting and supervising a sheriff's sale,[32] enjoyed the same sovereign immunity as the county.[33] It was immaterial whether his deputies negligently performed discretionary or ministerial acts; the sheriff's liability depended solely upon whether the county waived sovereign immunity.[34] As for negligent supervision, the court conjectured, the sheriff might have been liable "had he been sued in his personal capacity."[35]

The court again applied the restriction in cases involving a city police officer and a county deputy sheriff, both of whom plaintiffs sued for injuries resulting from high speed chases.[36] The complaint named each official in both his personal and official capacities, and the court marked the crucial importance of the distinction.[37] The court explained that "official capacity" suits are in reality suits against the local government itself and turn upon sovereign rather

31. 508 S.E.2d 159 (Ga. 1998).

32. The funds received in the sale had not been applied to satisfy existing superior liens on the property sold, and thus the plaintiff-purchasers were forced to make the payment. *Id.* at 160.

33. *Id.* ("[W]e find that the [plaintiffs'] claims against [the sheriff] in his official capacity are precluded under the doctrine of sovereign immunity.").

34. *Id.* at 160-61. There was no evidence of the county's waiver of sovereign immunity in this case. The court said: "For the benefit of both the bench and bar, we reiterate . . . [that] a sheriff sued in his official capacity may be held liable for the negligent performance of ministerial or discretionary acts of his employees only to the extent the county has waived sovereign immunity because he can only be sued in his official capacity under respondeat superior." *Id.* at 161 n.1.

35. *Seay*, 508 S.E.2d at 161.

36. Cameron v. Lang, 549 S.E.2d 341, 343-44 (Ga. 2001) (consolidating two cases: *Cameron v. Lang* (deputy sheriff) and *Williams v. Solomon* (police officer)).

37. *Id.* at 346.

than official immunity.[38] Such suits would yield liability, therefore, only had the government waived its sovereign immunity by the purchase of liability insurance.[39] The city possessed no insurance and the police officer enjoyed sovereign immunity; the county had obtained insurance and the deputy sheriff could thus be sued in his official capacity.[40]

The contrast stands, therefore, clearly and forcefully delineated: Suits against officers in their official capacity constitute suits against the local government, and must be considered under sovereign immunity—they play no part in the official immunity progeny.

In the bona fide official immunity context (i.e., when plaintiff sues the official in the official's individual capacity), the concept applies in the same manner to both municipal and county officials.[41] In this respect, consequently, the distinctions permeating the law of municipal and county sovereign immunity do not carry over to the principle of official immunity. This commonality of coverage appropriately follows, perhaps, from the court's articulated "purpose" of the concept: "The rationale for this [official] immunity is to preserve the public employee's independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight."[42] That "rationale" applies as forcefully to municipalities as to counties; indeed, it reaches various governmental entities. Accordingly, notions initially appearing as merely exercises in semantics may augur decisively in substantive fashion.

The supreme court likewise provided (mandated) guidance to the lower courts on procedural facets of the official immunity concept.[43] In a suit against an officer for injuries arising from a high speed chase, the lower court initially considered whether, under a relevant

38. *Id.* at 346 ("The doctrine of sovereign immunity, also known as governmental immunity, protects all levels of governments from legal action unless they have waived their immunity from suit.").

39. *Id.*

40. *Id.* at 347.

41. *Id.* at 347 (consolidating *Cameron* (county) and *Williams* (municipality)). "[W]e have applied the same standard of liability for the discretionary acts of city employees as for the acts of county employees." *Cameron*, 549 S.E.2d at 345.

42. *Id.* at 344.

43. *Id.* at 345.

state statute, the officer had acted in reckless disregard in continuing pursuit.[44] Disagreeing with the court's procedure, the supreme court directed that it should first determine the issue of official immunity.[45] Once again, the court rested its decision upon the concept's purpose: "Since state law . . . affords public officers and employees immunity from personal liability for discretionary acts in part to protect them from the risks of trial, it would not be logical, efficient, or fair to bypass the issue of [official] immunity in favor of the issue of causation."[46] Accordingly, the court instructed, "our state courts must consider the issue of a government employee's [official] immunity from liability as the threshold issue in a suit against the officer in his personal capacity."[47] By virtue of this direction, the supreme court insured that official immunity, usually a question of law, receives the trial court's initial attention in the case. Issues of a more factual complexion must await (and often fail to survive) the immunity determination.

As noted, a linchpin assessment under the interpreted amendment goes to the nature of the officer's injuring act. Official immunity immunizes only negligently performed discretionary functions; it expressly does not protect ministerial ones.[48] Drawing that crucial distinction and the facets factored into the exercise bode pivotal, therefore, in the judicial evaluation.

The supreme court's first assessment after *Gilbert*, which had denominated an officer's decision to rush to the scene of an emergency as "discretionary,"[49] appeared in an action for injuries caused by a truck driver's failure to obey a stop sign.[50] Plaintiff sued two county employees in their individual capacities, alleging

44. *Id.* at 344. The high speed chase privileges for law enforcement are codified in title 40 of the Georgia Code. *See* O.C.G.A. § 40-6-6 (2005).

45. *Cameron*, 549 S.E.2d at 343.

46. *Id.* at 345. ("[A] law enforcement officer's role in contributing to a collision during a high speed chase, which usually involves questions of fact under OCGA § 40-6-6, should be evaluated only after the court has determined that the officer is not immune from personal liability, which usually is a question of law.")

47. *Id.*

48. *See* Gilbert v. Richardson, 452 S.E.2d 476, 483 (Ga. 1994).

49. *See id.*

50. Woodard v. Laurens County, 456 S.E.2d 581, 582 (Ga. 1995).

"negligent inspection and maintenance of the stop sign."[51] In fashioning its delineation, the court asserted that "whether the acts . . . are ministerial or discretionary is determined by the facts of a particular case."[52] For instance, the court indicated, a failure to follow established procedures in replacing a missing sign would have constituted a "ministerial" decision.[53] Here, however, plaintiff's complaint targeted inadequate procedures for discovering and removing obscuring limbs.[54] Deciding "whether to adopt other or additional . . . procedures," the court distinguished, "'is left to [their] personal judgment and is therefore discretionary and not ministerial.'"[55] Accordingly, the employees enjoyed official immunity against this charge of negligence "in [the] performance of a discretionary act."[56]

By virtue of its exercise, the court not only confirmed the critical results of the ministerial-discretionary distinction, it also critiqued the distinction itself. Initially, the court implied that the same act might be discretionary in one case and ministerial in another, depending upon the facts.[57] Continuing, however, the court distinguished between cases involving two different acts.[58] One featured the failure to follow procedures; the other featured deciding whether to adopt procedures.[59] The latter called for an exercise of the officer's "personal judgment;" the former, apparently, did not.[60] The facet of personal judgment, in turn, defined the act as a discretionary function.[61]

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51. *Id.* Plaintiff also sued the county, five county commissioners, and the two county employees in their official capacities. *Id.* The court held that sovereign immunity protected all those defendants. *Id.* at 584.

52. *Id.* at 583.

53. *Id.* at 583 ("Here, there is no contention that the stop sign actually was missing and that the county employees failed to follow established procedures in replacing it.")

54. *Woodard*, 456 S.E.2d at 584 ("The contention is that the stop sign had become obscured by the limbs from nearby trees and that the procedures established by appellee county employees for discovering and removing such obstructions were inadequate.").

55. *Id.* (quoting Nelson v. Spalding County, 290 S.E.2d 915 (Ga. 1982)).

56. *Id.*

57. *Id.* at 583.

58. *Id.* at 584

59. *Id.*

60. *Woodard*, 456 S.E.2d at 584.

61. *Id.*

The court rendered a similar decision in a subsequent action against a county paramedic who allegedly misdiagnosed plaintiff's stricken wife and failed to use defibrillation.[62] Defendant's duty to ascertain and treat the patient's condition called for "'personal deliberation and judgment,'" observed the court, "'which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.'"[63] Accordingly, the paramedic's actions "were clearly discretionary," and the paramedic enjoyed the protection of official immunity.[64]

In other cases, the court simply agreed with litigants' characterizations of designated acts as discretionary but proffered no additional analysis for the determination. Instances included a jailer's entrustment of car keys to a jail inmate,[65] a police officer's execution of a search warrant,[66] and the officer's firing a gun in self-defense.[67] Finally, in yet another high speed chase case, plaintiff alleged that the officer "ran the stop sign without turning on his blue lights or his siren."[68] Even so, the court responded, those actions "do not change his decision to engage in a high speed pursuit into a ministerial act."[69] Rather, the decision remained discretionary and entitled the officer to official immunity.[70]

At this juncture, the supreme court had applied the discretionary designation to the following (allegedly negligent) acts: (1) deciding to rush to an emergency call;[71] (2) discovering and removing limbs

62. Harry v. Glynn County, 501 S.E.2d 196, 198 (Ga. 1998). Defendant paramedic unsuccessfully treated the plaintiff's wife, who had collapsed in a restaurant, and transported her to a hospital after which she died. *Id.* Plaintiff sued the paramedic, contending that his actions "were ministerial in that there was only one right way to treat [his wife]." *Id.* at 199.

63. *Id.* at 199 (quoting Schulze v. DeKalb County, 496 S.E.2d 273, 276 (Ga. Ct. App. 1998)).

64. *Id.* ("Since the record demands the conclusion that [the paramedic] was in the conduct of his official duties and was engaged in discretionary actions, . . . he is protected by official immunity.").

65. Merrow v. Hawkins, 467 S.E.2d 336, 337 (Ga. 1994) ("The parties agree that [the jailer] was exercising a discretionary power when he gave the car keys to [the inmate].").

66. Kidd v. Coates, 518 S.E.2d 124, 124-25 (Ga. 1999)

67. *Id.* ("As Appellants concede, Appellees' acts in executing the warrant and firing the gun at [plaintiff] were discretionary.").

68. Cameron v. Lang, 549 S.E.2d 341, 346 (2001). Defendant officer had run a stop sign at an intersection and collided with plaintiff. *Id.* at 343-44.

69. *Id.* at 346.

70. *Id.*

71. Gilbert v. Richardson, 452 S.E.2d 476, 483 (Ga. 1994).

which obscured a stop sign;[72] (3) diagnosing and treating a patient;[73] (4) entrusting car keys to a prisoner;[74] (5) executing a search warrant;[75] (6) shooting in self-defense;[76] and (7) deciding to engage in a high speed chase.[77] In contrast, the court characterized a failure to follow procedures in replacing a missing stop sign as ministerial.[78]

The elements of personal judgment, deliberation, examining facts, and reasoning to a conclusion all loomed large in the court's articulations of its discretionary conclusions. No matter how negligent the execution, moreover, the officer's basic judgment to perform the act remained discretionary.[79] In contrast, the court indicated, a failure to follow established procedures seemed ministerial, although it failed to find such an instance throughout the entire decade.[80]

Assuming a suit in the officer's individual or personal capacity, and for the officer's discretionary conduct, the final inquiry focuses upon the severity of the offending actions. That inquiry arises from the 1991 amendment's interpreted imposition of liability for discretionary acts committed "with actual malice or with actual intent to cause injury."[81] The degree of the wrong ("wrongness") assumes determinative significance in governing official immunity's substantive reach. When an offense transcends the boundary of negligence and enters the realm of "actual malice or intent," official immunity for personal liability terminates.[82] Not surprisingly, injured plaintiffs frequently advance the wrongness argument, requiring from the judiciary yet another delineating analysis. The supreme court has treated the issue in several cases.

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72. Woodard v. Laurens County, 456 S.E.2d 581, 584 (Ga. 1995).
73. Harry v. Glynn County, 501 S.E.2d 196, 198 (Ga. 1998).
74. Merrow v. Hawkins, 467 S.E.2d 336, 337 (Ga. 1996).
75. Kidd v. Coates, 518 S.E.2d 124, 125 (Ga. 1999).
76. *Id.*
77. Cameron v. Lang, 549 S.E.2d 341, 346 (Ga. 2001).
78. Woodard v. Laurens County, 456 S.E.2d 581, 583 (Ga. 1995).
79. *See Cameron*, 549 S.E.2d at 346.
80. *See, e.g., Woodard*, 456 S.E.2d at 583.
81. GA. CONST. art. I, § II, para. IX.
82. *See id.*

Merrow v. Hawkins featured a motorist's action for injuries received in a collision with a jail inmate to whom defendant jailer had entrusted his car.[83] The trial court rejected the jailer's plea of official immunity, relying upon a slander case which equated "actual malice" with "reckless conduct."[84] Defendant's actions, the court then held, amounted to a "reckless disregard for the safety of others."[85] In response, the supreme court promptly "granted an interlocutory appeal in this case of first impression to construe the meaning of the term 'actual malice' as it is used in the context of official immunity."[86] That context, the court emphasized, emanated from the constitutional amendment's employment of "actual malice" rather than "mere malice."[87] Actual malice is similar to criminal law's "express malice," the court reasoned; it must be distinguished from "implied malice," denoting a "'reckless disregard for human life.'"[88] Accordingly, the court concluded, the amendment "requires a deliberate intention to do wrong."[89] Finding no evidence demonstrating such intent, the jailer enjoyed official immunity.[90]

The court's first-impression construction of actual malice thus signaled a connotation of severe wrongdoing. Borrowing criminal law's express malice standard for the occasion, the court insisted

83. 467 S.E.2d 336, 337 (Ga. 1996). Defendant jailer gave the keys to his car to the inmate, a trusty, and asked him to wash it. *Id.* The inmate escaped from the prison complex and collided with plaintiff. *Id.*

84. *Id.*; *see also* Sparks v. Thurmond, 319 S.E.2d 46, 49 (Ga. Ct. App. 1984) (equating actual malice in slander cases with reckless conduct).

85. *Merrow*, 467 S.E.2d at 337 (noting that the trial court had therefore denied summary judgment for the jailer).

86. *Id.*

87. *Id.* at 338 ("While we recognize that our courts have defined 'malice' as involving reckless disregard for the rights of others, . . . it is 'actual malice,' not mere 'malice,' that is addressed in the 1991 amendment . . . .").

88. *Id.* ("Express or actual malice, although a term not typically used in the context of civil litigation, . . . is found in criminal law and has long been distinguished from 'implied malice,' a term which has long been defined to mean conduct exhibiting a 'reckless disregard for human life.'").

89. *Id.* at 337 ("We hold that in [the 1991 amendment's] context, 'actual malice' requires a deliberate intention to do wrong."). The court abolished the "reckless disregard" standard of Logue v. Wright, 392 S.E.2d 235 (Ga. 1990), a case decided prior to the 1991 amendment. *Merrow*, 467 S.E.2d at 338.

90. *Merrow*, 467 S.E.2d at 338 (reversing the trial court's failure to grant summary judgment for the jailer).

upon a showing of deliberate intent to wrong.[91] To pierce the protection of official immunity, the court indicated, an injured plaintiff carried a substantial constitutionally-imposed burden.[92]

The burden became no lighter under the court's later decisions. In a wrongful death action, plaintiff sued two law enforcement officers who, in executing a "no-knock" search warrant, fired their guns at decedent.[93] Plaintiff charged the officers with "actual intent to cause injury" under the constitutional amendment, because they "intentionally fired their guns at [decedent]."[94] In analyzing that charge, the supreme court distinguished between the intent to injure plaintiff and the intent to do the act that injured plaintiff.[95] Only the former, the court held, would suffice.[96] Moreover, if the officers shot decedent in self-defense, "then they had no actual tortious intent to harm him."[97] Because plaintiff failed to impeach defendants' self-defense evidence, she likewise failed to show their "actual tortious intent to harm [decedent]."[98] Accordingly, the officers enjoyed official immunity.[99]

A final instance of the "wrongness" issue involved a county high school coach who assigned a student, admittedly guilty of destroying school property, to a work detail cutting weeds with a pair of

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91. *Id.* at 337.

92. *Id.*

93. Kidd v. Coates, 518 S.E.2d 124, 125 (Ga. 1999). Defendants were among a group of law enforcement officers conducting a drug raid at the decedent's home. *Id.* Both defendants shot at decedent, and a bullet from the gun of one defendant killed the decedent. *Id.*

94. *Id.* Plaintiffs did not charge that defendants acted with actual malice under the amendment but rather with "actual intent to cause injury." *Id.* The court said that "[f]or purposes of this appeal only, we assume that 'actual malice' and 'actual intent to cause injury' do not have identical meanings." *Id.*

95. *Kidd*, 518 S.E.2d at 125.

96. *Id.* "This is consistent with the holding that [the constitutional amendment] protects 'individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without *willfulness, malice or corruption.*'" *Id.* at 125 (quoting Daniels v. Gordon, 503 S.E.2d 72 (Ga. Ct. App. 1998)) (emphasis added).

97. *Id.* at 125. Rather, they "acted only with the justifiable intent which occurs in every case of self-defense, which is to use such force as is reasonably believed to be necessary to prevent death or great bodily injury to themselves or the commission of a forcible felony." *Id.*

98. *Id.* Plaintiff "presented no evidence that [decedent] was unarmed, that [defendants] did not have a reasonable belief that deadly force was necessary, or that a gun was 'planted' beside [decedent's] body." *Kidd*, 518 S.E.2d at 126.

99. *Id.*

scissors.[100] The student complained of injury to his wrist and charged the coach with actual malice.[101] The court of appeals equated actual malice with "ill will" and found sufficient evidence for a jury.[102] Forcefully reversing,[103] the supreme court "reject[ed] the position that proof of 'ill will' is itself enough to establish actual malice under the [constitutional amendment]."[104] Indeed, the court ridiculed the "absurd result" of allowing plaintiff to pierce the coach's official immunity "solely on the basis of the defendant's rancorous personal feelings."[105] Branding such feelings "irrelevant," the court reemphasized *Merrow*'s construction of actual malice as "a deliberate intention to do a wrongful act."[106] "Such [an] act may be accomplished with or without ill will."[107]

The supreme court has thus brooked no tendency toward piercing official immunity by a diluting treatment of actual malice or actual intent to cause injury.[108] Via both interlocutory appeal and writ of certiorari, the court dealt forcefully indeed with lower court equations which it viewed to weaken the constitution's requirements. In rapid-fire succession, the court fashioned the following distinctions: (1) actual malice versus mere malice;[109] (2) express malice versus implied malice;[110] (3) intent to injure versus intent to do the injuring act;[111] and (4) actual malice versus ill will.[112] In each instance, the court opted for the more demanding standard. Rejecting reliance

100. Adams v. Hazelwood, 520 S.E.2d 896, 897 (Ga. 1999). The student admitted participating in a senior prank of burning a portion of the school's football field and agreed to punishment of in-school suspension and work detail. *Id.*

101. *Id.* Because plaintiff did not allege "actual intent to cause injury," he must show "actual malice" under the constitutional amendment. *Id.*

102. Hazelwood v. Adams, 510 S.E.2d 147, 150-51 (Ga. Ct. App. 1998).

103. Adams v. Hazelwood, 520 S.E.2d 896, 897 (Ga. 1999) ("Because ill will alone is insufficient to establish actual malice, we reverse.").

104. *Id.* at 898 ("Actual malice requires more than harboring bad feelings about another.").

105. *Id.*

106. *Id.*; Merrow v. Hawkins, 467 S.E.2d 336, 337 (1996).

107. Adams v. Hazelwood, 520 S.E.2d 896, 898 (Ga. 1999). "Thus, even assuming [the coach] harbored ill will towards [the student], we find no evidence that [the coach] acted with a deliberate intent to commit a wrongful act or with a deliberate intent to harm [the student]." *Id.* at 898-99.

108. *See, e.g., Merrow*, 467 S.E.2d at 338.

109. *Id.*

110. *Id.*

111. *See* Kidd v. Coates, 518 S.E.2d 124, 125 (Ga. 1999).

112. *See Adams*, 520 S.E 2d at 898.

upon the law of defamation, as well as its own prior treatment of official immunity, the court held the 1991 amendment to parallel the requirements of criminal law.[113] Those requirements evoke "a deliberate intention to do wrong,"[114] "an actual tortious intent to harm,"[115] and an intention surpassing "rancorous personal feelings."[116] At this juncture in its *Gilbert* progeny, the supreme court has found no plaintiff who satisfied those standards sufficiently to pierce the concept of official immunity.

During the past decade, therefore, the Georgia Supreme Court has labored to perfect its original interpretation of the 1991 constitutional amendment. In the context of opinions in eight important cases, the court has analyzed the official immunity concept's pivotal issues of capacity, functions, and severity. Treating those issues according to its perception of the principle's evolved purpose, the court has structured a lesson outline of decisional essentials. Concurrently, the Georgia Court of Appeals has struggled to apply that outline to a veritable litigation explosion in local government law.

III. A DECADE OF DECISIONS: THE COURT OF APPEALS

A. Case Volume

Table I generally reflects the total number of official immunity cases (by year) decided by the Georgia Court of Appeals over the past decade.[117]

113. *See Merrow*, 467 S.E.2d at 338.
114. *See Adams*, 520 S.E 2d at 898.
115. *See Kidd*, 518 S.E.2d at 126.
116. *See Adams*, 520 S.E 2d at 898.
117. Although no guarantee of complete accuracy can be given, care has taken care to assure the absence of material error.

Table I—Court of Appeals' Official Immunity Cases 1995-2004

	Year	Number of Cases
	1995	4
	1996	6
	1997	4
	1998	14
	1999	1
	2000	8
	2001	4
	2002	9
	2003	9
	2004	4
Totals	**10 Years**	**63 Cases**

Over the decade, the Table reveals, the court decided a total of 63 cases dealing with official immunity, an average slightly exceeding six cases per year. Consistently, therefore, the concept has maintained its staying power as one of the most fiercely litigated facets in local government law. Few issues have claimed such sustained intermediate appellate attention for the last ten years.

The decisional activity reached its highest concentration in 1998, with fourteen cases (followed by nine decisions in 2002 and 2003), and its lowest presence in 1999, with only one case. Otherwise, yearly totals ranged from four cases to eight, evidencing no distinct pattern over the chronicled period. Obviously, local government officials remain favorite targets for injured parties seeking at least some recourse from the bar of sovereign immunity.

Table II separates the litigation according to the targeted officer's local government entity: municipality or county.

Table II—Local Government Entity of Official Immunity Defendants

	Year	City Officer	County	Total Cases
	1995	1	3	4
	1996	0	6	6
	1997	0	4	4
	1998	3	11	14
	1999	0	1	1
	2000	2	6	8
	2001	3	1	4
	2002	1	8	9
	2003	1	8	9
	2004	0	4	4
Totals	**10**	**11 (17%)**	**52 (83%)**	**63**

Although a distinction without significance regarding the law of official immunity, county officers markedly outnumbered municipal officers as defendants in the cases. As the Table depicts, 83% of those cases targeted officers, agents, and employees at the county level of government. While the degree of this difference is somewhat surprising, perhaps it reflects the county's more extensive sovereign immunity. In any event, over the past ten years, a county officer's odds of being individually sued substantially exceeded those of a municipal officer.

Yet another facet deserving of preliminary attention concerns the subject matter of official immunity litigation. Table III features the facet, involving two specially selected subjects: automobiles and schools.

Table III—Official Immunity Cases Involving Autos and Schools

	Year	Auto Cases	School Cases
	1995	0	4
	1996	3	4
	1997	0	1
	1998	0	4
	1999	0	1
	2000	2	1
	2001	0	1
	2002	1	0
	2003	1	1
	2004	0	2
Totals	**10**	**7 (11%)**	**19 (30%)**

The Table demonstrates that of the total 63 official immunity cases decided over the past decade, 11% involved automobiles and 30% pertained to schools. Each of those derivations bears emphasis, but for different reasons.

As for automobiles, the year 2005 marks the start of the phase-in period for statutes waiving sovereign immunity of cities and counties for losses arising out of claims for the government's negligent operation of automobiles.[118] With injured plaintiffs being afforded this new source of recovery, presumably their actions against individual officers in automobile cases will decrease. Accordingly, if an appreciable portion of the official immunity cases involved automobiles, the new statutes might carry a significant impact. The derivation of Table III, however, would appear to belie such

118. *See* O.C.G.A. §§ 39-92-1 to -5 (2005). The General Assembly enacted this legislation in 2002, which, beginning in 2005, phased in an express waiver of local government immunity for losses arising out of claims for the negligent operation of motor vehicles. *See id.*

expectations. With but 11% of the last decade's official immunity cases treating local government automobiles, the new statutory scheme's potential impact appears minimal.

As for the second derivation, no innovative changes appear on the horizon. Rather, it simply bodes impressive that almost one-third of all official immunity cases targeted school officers. For the last ten years, therefore, the persons who service public education in Georgia have spent appreciable amounts of time and effort defending themselves in court. For them, the concept of official immunity looms large and beneficial.

Whatever the concept's history, purpose, or future, official immunity has garnered high-profile judicial recognition over the past decade. Its forceful application by the court of appeals stands as impressive as the litigation volume itself. Consistently, the doctrine receives the court's invocation to free erring officials from personal liability in their service to local governments. As a proffered tactic for avoiding the bar of sovereign immunity, the principle has offered minimal success for injured plaintiffs. Attorneys for those plaintiffs owe careful and early consideration to this body of decisional law: its teachings may counsel the value of informed prudence in going forward.

B. Substantive Facets

As resoundingly reflected, two substantive issues typically receive primary judicial analysis in the official immunity litigation. First, the court ordinarily draws the discretionary-ministerial distinction to determine the concept's coverage. If it concludes discretionary, then the court's focus shifts to the wrongness of the act (negligence versus actual malice or intent). Although all facets of every case are important, these are the two which loom most decisively in this special context.

The Georgia Court of Appeals' remarkable case volume over the past decade favors an analysis narrowed to those issues. Accordingly, a survey of each year's litigation foregoes a traditional case-by-case descriptive approach and attempts rather to highlight the dual decisional essentials. Both yearly and collectively, those essentials

might best serve a plaintiff's attorney in preliminarily gauging likely success.

1. Yearly

1995: The court decided a total of four official immunity cases in 1995, all brought against public school officials, each seeking recovery for injuries to a school child while on school premises. In each case, the court held official immunity to prevail.

Coffee County School District v. Snipes[119]

Conduct charged	Function	Wrongness
Negligent recess supervision	Discretionary	Negligence

Bitterman v. Atkins[120]

Conduct charged	Function	Wrongness
Negligent supervision of locker work	Discretionary	Negligence

Teston v. Collins[121]

Conduct charged	Function	Wrongness
Negligent control of class visitors	Discretionary	Negligence

Davis v. Dublin Board of Education[122]

Conduct charged	Function	Wrongness
Willful disregard of building maintenance	Discretionary	Negligence

119. 454 S.E.2d 149 (Ga. Ct. App. 1995). In that case, a child fell in the gym during recess. *Id.* at 149, 151. In finding official immunity prevailed, the court observed that no written rules or regulations existed. *Id.* at 152.

120. 458 S.E.2d 688 (Ga. Ct. App. 1995). There, a child was struck by a falling locker. *Id.* at 689. The court ultimately held that the official was responsible for ordering the lockers but not for installing them. *Id.* at 691.

121. 459 S.E.2d 452 (Ga. Ct. App. 1995). In *Teston*, a non-student visitor to a shop class had intentionally struck a child. *Id.* at 453. The court said school board policy imposed a duty on visitors and gave the school official discretionary authority to control them. *Id.* at 454.

122. 464 S.E.2d 251 (Ga. Ct. App. 1995). In that case, a child tripped over a rug and fell into a cracked glass door. *Id.* at 252. Noting the plaintiff's evidence showed no intent to inflict injury, the court held that the provision and maintenance of school buildings and facilities were discretionary functions. *Id.* at 252-53.

1996: The official immunity case volume increased to a total of six cases in 1996. Four instances presented claims against public school officials, and two controversies involved high speed driving by law enforcement officers. In five of the cases, the immunity doctrine concluded the litigation in favor of the defendants.

Wright v. Ashe[123]

Conduct charged	Function	Wrongness
Lax enforcement of absentee policy	Discretionary	Negligence

Hemak v. Houston County School District[124]

Conduct charged	Function	Wrongness
Negligent review of premises repair	Discretionary	Negligence

Kelly v. Lewis[125]

Conduct charged	Function	Wrongness
Inadequate care for arriving students	Discretionary	Negligence

123. 469 S.E.2d 268 (Ga. Ct. App. 1996). In *Wright*, a school child was killed in an auto accident while skipping school. *Id.* at 269. While the plaintiff alleged that school officials violated a ministerial duty in failing to enforce school policies, the court held that supervising, monitoring, and controlling school children are discretionary functions. *Id.* at 270-71.

124. 469 S.E.2d 679 (Ga. Ct. App. 1996). There, plaintiff fell on a drainage grate on school premises while attending a concert and sued school officers for negligently failing to inspect repairs that the maintenance department made on the drain. *Id.* at 680-81. The court said that review of repairs involved evaluation and is the essence of a discretionary function. *Id.* at 682.

125. 471 S.E.2d 583 (Ga. Ct. App. 1996). In *Kelly*, a child was shot by a gang while on the way to school. *Id.* at 585. The court reasoned that "the complete failure to perform a discretionary act is the same as the negligent performance of that act for purposes of determining whether such action was discretionary or ministerial," and the school officers' decision as to where best to direct attention for student security was discretionary. *Id.* at 587.

Perkins v. Morgan County School District[126]

Conduct charged	Function	Wrongness
(1) Failure to adopt early dismissal rule	Discretionary	Negligence
(2) Failure to enforce school policy	Discretionary	Negligence

Morgan v. Barnes[127]

Conduct charged	Function	Wrongness
Negligent chase of suspected stolen car	Discretionary	Negligence

Johnson v. Gonzalez[128]

Conduct charged	Function	Wrongness
Reckless disregard in answering call	Discretionary	For jury

1997: Of the four official immunity cases before the court of appeals in 1997, one targeted school officials and the others arose in the context of law enforcement.

126. 476 S.E.2d 592 (Ga. Ct. App. 1996). There, third parties killed a child off school premises after the school granted early release. *Id.* at 594. Plaintiff charged school board members with negligently failing to adopt an early dismissal rule. *Id.* The court said the decision to adopt or not adopt an early dismissal rule is entirely discretionary. *Id.* at 595. Additionally, Plaintiff charged the school vocational secretary with negligently administering school rules. *Id.* at 595-96. Again, the court said that monitoring, supervising, and controlling student activities is discretionary action. *Id.* at 596.

127. 472 S.E.2d 480 (Ga. Ct. App. 1996). In *Morgan*, a deputy sheriff collided with the plaintiff while pursuing a suspected stolen car. *See id.* at 481. The court said the officer's decision to pursue the car, taking circumstances into account, required the exercise of personal judgment and deliberation and was thus discretionary. *Id.* The court noted the absence of evidence that the deputy had acted with malice or intent to injure. *Id.*

128. 478 S.E.2d 410 (Ga. Ct. App. 1996). There, an officer responding to an "urgent" call collided with plaintiff while attempting to pass him on the left. *Id.* at 411-12. The court reasoned that the call removed the officer from his routine patrol, and his acts in response to the call were discretionary. *Id.* at 412. The court further held that "[a] jury must decide whether [the officer's] decision to overtake . . . was merely negligent or whether it constituted a reckless disregard for the safety of others." *Id.* at 412; *see also* Merrow v. Hawkins, 467 S.E.2d 336, 338 (Ga. 1996) (holding that a reckless disregard for human life was not sufficient to show actual malice under the 1991 amendment).

Crisp County School System v. Brown[129]

Conduct charged	Function	Wrongness
Directing child to traverse monkey bars	Discretionary	Negligence

Diaz v. Gwinnett County[130]

Conduct charged	Function	Wrongness
Not providing hepatitis vaccination	Discretionary	Negligence

Simmons v. Coweta County[131]

Conduct charged	Function	Wrongness
(1) Supervision of road crew	Ministerial	Negligence
(2) Supervision by correctional officer	Discretionary	Negligence

Seay v. Cleveland[132]

Conduct charged	Function	Wrongness
Supervision of sheriff's sale	Ministerial	Negligence

129. 487 S.E.2d 512 (Ga. Ct. App. 1997). In *Crisp County*, an instructor directed a child to cross the bars despite her protests that she did not know how to do so, and the child fell, suffering a broken arm. *Id.* at 514. The court said the decisions and acts of the instructor, regarding monitoring, supervising, and control, were discretionary functions. *Id.* at 516. The court said there was no evidence that the instructor acted with actual malice or an actual intent to injure. *Id.*

130. 485 S.E.2d 42 (Ga. Ct. App. 1997). There, an undercover drug agent contracted hepatitis while working with a known drug dealer and charged his supervisors with failing to make vaccination available to him. *Id.* at 43. The court held that the supervisors' conduct was discretionary. *Id.*

131. 494 S.E.2d 362 (Ga. Ct. App. 1997). In that case, a road crew supervised by a correctional officer neglected to find a coil of wire that injured plaintiff, the operator of a bush hog. *Id.* at 365. The court said that "[d]irecting, supervising, and guarding a routine detail of correctional inmates in picking up trash and cutting grass along a county road involves no discretion and was ministerial in nature as a matter of law." *Id.* at 367. The plaintiff also alleged that the prison warden and deputy warden negligently supervised the correctional officer. *Id.* at 368. The court, however, said their official acts were discretionary. *Id.*

132. 493 S.E.2d 30 (Ga. Ct. App. 1997), *rev'd*, 508 S.E.2d 159 (Ga. 1998). There, plaintiffs purchased property at the sale, but the sheriff's deputies failed to use the sale funds to pay off superior liens on the property purchased. *Id.* at 31. The court of appeals held the sheriff responsible for negligently supervising his deputies in conducting the sale on grounds that the acts were ministerial, and that he could thus be sued in his official capacity. *Id.* Reversing, the supreme court held that sovereign immunity barred a suit against the sheriff in his official capacity no matter what characterization was given to the negligent functions. Seay v. Cleveland, 508 S.E.2d 154, 161 (Ga. 1998).

1998: The year 1998 presented a decade high of fourteen cases. Rather evenly distributed across a range of local government activities, the official immunity issue touched roads, law enforcement, public schools, and paramedics. In all areas, the court of appeals continued its focus upon function and wrongness.

Brown v. Hines[133]

Conduct charged	Function	Wrongness
Failure to replace missing stop sign	Ministerial	No Negligence

Ross v. Taylor[134]

Conduct charged	Function	Wrongness
Sub-grading of county road	Ministerial	Negligence for Jury

Lincoln County v. Edmond[135]

Conduct charged	Function	Wrongness
Failure to remove tree from road	Ministerial	Negligence for Jury

133. 495 S.E.2d 592 (Ga. Ct. App. 1998). There, the decedent died in a collision at an intersection where the stop sign had been removed. *Id.* at 593. Plaintiff sued the county correctional officer for failing to perform his duty to replace the sign. *Id.* The court said the duty to replace the sign would become ministerial once the officer with that duty receives notice that the sign is missing. *Id.* However, the court found the evidence insufficient to show that the defendant ever received that notice. *Id.*

134. 498 S.E.2d 803 (Ga. Ct. App. 1998). There, plaintiff suffered injuries in an accident that she alleged resulted from a road superintendent's negligence in subgrading a road. *Id.* at 804. The court said the superintendent and his crew did the subgrading under supervision of the State DOT by following the grade stakes. *Id.* at 805. The court said that defendant's duties may have involved the exercise of some degree of judgment, but the work consisted solely of ministerial acts. *Id.*

135. 501 S.E.2d 38 (Ga. Ct. App. 1998). In *Lincoln County*, the decedent died in a car accident on a road blocked by a tree that had fallen due to an overnight storm. *Id.* at 40. Plaintiff sued the road superintendent for failing to remove the tree within a period of two hours after he knew of its presence in the road. *Id.* The court reasoned that the tree removal was a ministerial duty, regardless of the elements of discretion present during the execution of the mandatory job. *Id.* at 42.

Coffey v. Brooks County[136]

Conduct charged	Function	Wrongness
(1) Non-repair of storm damaged roads	Discretionary	Negligence
(2) Failure to report road damage	Ministerial	Negligence for Jury

Stone v. Taylor[137]

Conduct charged	Function	Wrongness
Failure to level road shoulders	Discretionary	Negligence

Lowe v. Jones County[138]

Conduct charged	Function	Wrongness
Negligently effecting an arrest	Discretionary	Negligence

136. 500 S.E.2d 341 (Ga. Ct. App. 1998). In *Coffey*, the action arose from car accidents occurring on the same night on a washed-out section of county road; a storm earlier in the night caused the wash-out. *Id.* at 344. The court held that road superintendents and employees were responsible for checking roads and making repairs, and this responsibility involved the exercise of personal deliberation and judgment regarding resource allocation. *Id.* at 346. Thus, acts relating to the manner of inspection and action to be taken were discretionary. *Id.* However, the plaintiffs also charged that a deputy sheriff negligently failed to report the dangerous road conditions to the dispatcher upon discovering the situation prior to the accidents. *Id.* at 347. The court held that the deputy's duty to report flooding conditions was a ministerial function because both policy and road conditions demanded that the deputy report the situation. *Id.*

137. 506 S.E.2d 161 (Ga. Ct. App. 1998). *Stone* was a motorist's action against a county commission chairman for failing to level the shoulders of a resurfaced road. *Id.* at 163. The county's resurfacing contract with the State DOT required the county to level the shoulders when applicable. *Id.* at 162-63. The court reasoned that the defendant's acts in inspecting the road shoulders and deciding not to modify them were discretionary. *Id.* at 164. The defendant observed the conditions, and based on his experience, he made the decision not to modify the shoulders. *Id.* No specifications were imposed as to how he was to perform the function. *Id.*

138. 499 S.E.2d 348 (Ga. Ct. App. 1998). There, a third party struck and killed decedent while he was struggling in a lane of traffic with the defendant county deputy who was attempting to arrest him. *Id.* at 349-50. The court termed the operation of a police department a discretionary function. *Id.* at 350. The court also emphasized the lack of any evidence showing defendant guilty of willfulness or malice. *Id.*

Parrish v. Akins[139]

Conduct charged	Function	Wrongness
Allowing inmate to escape work detail	Discretionary	Negligence

Smith v. Little[140]

Conduct charged	Function	Wrongness
Improper investigation of accident	Discretionary	Negligence

Sommerfield v. Blue Cross & Blue Shield of Georgia, Inc.[141]

Conduct charged	Function	Wrongness
Negligent traffic direction	Discretionary	Negligence

139. 504 S.E.2d 276 (Ga. Ct. App. 1998). In *Parrish*, an escaped inmate under the supervision of the defendant correctional officer injured the plaintiff. *Id.* at 277. Plaintiff argued that state regulations required that defendant keep inmates under constant supervision, but the court noted that the regulations provided no explicit procedures. *Id.* at 278. Furthermore, the mere fact that supervising prisoners was a mandatory function did not render the carrying out of the supervision a ministerial function. *Id.* The court found that the officer's decision in supervising the work detail was fully within his judgment and constituted a discretionary function. *Id.* At most, the court observed, defendant's decision to allow inmates to work on one side of the building while he helped inmates around the corner was negligent, and there was no evidence of actual malice. *Id.*

140. 506 S.E.2d 675 (Ga. Ct. App. 1998). There, plaintiff alleged that the defendant police officer failed to properly conduct an investigation of a traffic accident and incorrectly attributed fault to the plaintiff. *Id.* at 675-76. While the court did not expressly address whether the officers actions were ministerial or discretionary, it did find that the trial court erroneously applied the incorrect legal standard of whether defendant officer's actions were willful or wanton. *Id.* at 676. The correct standard, the court emphasized, was one of express malice or malice in fact, and the record contained no evidence of such conduct. *Id.* at 279.

141. 509 S.E.2d 100 (Ga. Ct. App. 1998). In *Sommerfield*, plaintiff motorist was involved in a collision allegedly due to the negligent direction of traffic by defendant off-duty police officer while the officer was working for a private employer. *Id.* at 101. While the court was not explicit on whether the issue was ministerial or discretionary, it took pains to affirm the trial court's rejection of plaintiff's argument that defendant was performing a private function because he was working for a private employer. *Id.* at 102. The court stressed that directing traffic is always a public police function, no matter who is assisted in the process. *Id.* On that ground, it affirmed that the defendant was entitled to official immunity. *Id.*

Payne v. Twiggs County School District[142]

Conduct charged	Function	Wrongness
Non-enforcement of weapons policy	Discretionary	Negligence

Daniels v. Gordon[143]

Conduct charged	Function	Wrongness
Grasping student's face in classroom	Discretionary	Negligence

Caldwell v. Griffin Spalding County Board of Education[144]

Conduct charged	Function	Wrongness
Failure to protect against hazing	Discretionary	Negligence

Dollar v. Dalton Public Schools[145]

Conduct charged	Function	Wrongness
Failure to prevent playground injury	Discretionary	Negligence

142. 501 S.E.2d 550 (Ga. Ct. App. 1998). There, plaintiff student was cut with a knife on the school bus by another student and sued the assistant principal and bus driver, alleging their negligent failure to carry out the ministerial act of enforcing the school's weapons policy. *Id.* at 552. The court said that the school's policy required the school officials to assess the credibility of prior reports of violations and to make a judgment call on the merits of an immediate investigation. *Id.* This came within the disciplinary and supervisory tasks of school officials and constituted discretionary acts. *Id.*

143. 503 S.E.2d 72 (Ga. Ct. App. 1998). *Daniels* was an action against a county middle school teacher who, in attempting to get a misbehaving student's attention in the classroom, grasped his face and turned his head to face her. *Id.* at 74. The court said the teacher was fulfilling her discretionary tasks of monitoring, supervising, and controlling the students in her class. *Id.* at 75. The court stressed the absence of any evidence that the teacher acted with actual malice. *Id.*

144. 503 S.E.2d 43 (Ga. Ct. App. 1998). In *Caldwell*, the plaintiff alleged a high school principal and football coach negligently failed to protect a student against hazing injuries at summer football camp by failing to carry out their ministerial duty to prevent the state crime of hazing. *Id.* at 43-44. The court said that compliance with the law is mandatory and in that sense arguably ministerial, but a criminal statute governing the conduct of third parties does not create a ministerial duty on school officials to enforce that statute. *Id.* at 45. Rather, the court found that supervision of student safety is a discretionary function. *Id.* The court found that no evidence indicated the school officials acted with actual malice and held that implied malice or a reckless disregard for the safety of others is insufficient to pierce official immunity. *Id.*

145. 505 S.E.2d 789 (Ga. Ct. App. 1998). This case involved an action against two childcare workers for a child's injury resulting from a fall on playground equipment while attending an after-school childcare program on school premises. *Id.* at 789-90. The court applied official immunity in favor of the childcare workers on grounds that tasks imposed on teachers to monitor, control, and supervise students are discretionary actions. *Id.* at 791.

Schulze v. DeKalb County[146]

Conduct charged	Function	Wrongness
Delay in transporting hospital patient	Discretionary	Negligence

1999: The year featuring the largest number of official immunity cases during the decade was followed by the year of the fewest such instances. In 1999, the court of appeals considered one case, a school child's injury, where it applied the doctrine.

Chamblee v. Henry County Board of Education[147]

Conduct charged	Function	Wrongness
Negligent instruction and supervision	Discretionary	Negligence

2000: From the eight material cases of 2000, a majority arose in the context of law enforcement. Additionally, road conditions and school child injuries completed the agenda.

146. 496 S.E.2d 273 (Ga. Ct. App. 1998). Plaintiff sued county paramedics for delaying her transportation to the hospital while they made arrangements for the care of her small child. *Id.* at 274. Plaintiff claimed her second child suffered birth defects. *Id.* The court said that upon arriving on call, the paramedics examined the facts and exercised personal deliberation and judgment in delaying plaintiff's transportation for several minutes while making certain the small child would not be left alone. *Id.* at 276. The court termed these actions clearly discretionary. *Id.* The court noted that there were neither allegations nor evidence that the paramedics' actions were willful or wanton. *Id.*

147. 521 S.E.2d 78 (Ga. Ct. App. 1999). There, plaintiff's son was injured while riding in a faculty member's car that someone was test-driving as a part of the son's shop class taught by defendant. *Id.* at 79. Plaintiff alleged that the defendant negligently allowed the student to leave class in violation of board of education rules. *Id.* The court said that the policies allegedly violated related to monitoring, supervision, and control of students in and around school during school activities and their implementation was discretionary in nature. *Id.* at 80. The court affirmed the trial court's conclusion that the instructor did not act maliciously or with the intent to injure. *Id.* at 79, 83.

Woodward v. Gray[148]

Conduct charged	Function	Wrongness
Arrest without probable cause	Discretionary	Negligence

Williams v. Solomon[149]

Conduct charged	Function	Wrongness
Collision from reckless pursuit	Discretionary	Negligence

White v. Traino[150]

Conduct charged	Function	Wrongness
Assault, illegal search, false arrest	Discretionary	Negligence

Todd v. Kelly[151]

Conduct charged	Function	Wrongness
Malicious prosecution	Discretionary	Negligence

148. 527 S.E.2d 595 (Ga. Ct. App. 2000). In *Woodard*, the plaintiff sued the defendant police officer alleging an arrest without probable cause for disorderly conduct. *Id.* at 597. The event arose from an errant drug sting, and the court held that plaintiff's conduct was not sufficiently disorderly to warrant the arrest. *Id.* at 598, 600. Despite the unlawful arrest, the court said, the officer performed a discretionary act in arresting plaintiff for disorderly conduct for arguing with the officer and failing to obey the officer's command. *Id.* at 600. The court said that the plaintiff did not show actual malice by showing mere anger, frustration, or irritation, and here there was no inference of actual malice. *Id.*

149. 531 S.E.2d 734 (Ga. Ct. App. 2000). There, plaintiff sued for injuries received in an intersection collision with the defendant officer who allegedly pursued a suspected stolen car in reckless disregard of plaintiff's safety. *Id.* at 735. The court reasoned that the officer exercised discretion in deciding to pursue the suspected stolen vehicle. *Id.* at 736. The court observed that plaintiff's charge of reckless disregard did not equate with a charge of the actual malice sufficient to defeat official immunity. *Id.*

150. 535 S.E.2d 275 (Ga. Ct. App. 2000). Defendant officer supervised a drug raid on plaintiff's house while executing a lawful warrant, and plaintiff claimed to have suffered injuries during the raid. *Id.* at 276. The court observed that while supervising the execution of the search warrant, the officer exercised a discretionary function and was entitled to immunity for performance of his official discretionary duties even if performed negligently. *Id.* at 277-78. The court noted the lack of evidence that defendant acted with a deliberate intent to do wrong. *Id.* at 278.

151. 535 S.E.2d 540 (Ga. Ct. App. 2000). Plaintiff sued the defendant police officer for malicious prosecution in seeking a warrant for plaintiff's tampering with evidence in an investigation. *Id.* at 541. Those charges were later dismissed. *Id.* The court said defendant decided to seek the warrant after conducting an investigation into facts regarding altered documents and concluding that plaintiff had tampered with evidence to be used in a criminal investigation. *Id.* at 542. The making of that decision, the court concluded, was a discretionary act. *Id.* The court said that although defendant's actions in seeking the warrant may have been misguided, there was no evidence of a deliberate intention to do wrong. *Id.* at 543.

Tkacik v. Chriss[152]

Conduct charged	Function	Wrongness
Failure to yield right of way	Discretionary	Negligence

Phillips v. Walls[153]

Conduct Charged	Function	Wrongness
Negligent upkeep of road intersection	Ministerial	No Negligence

Wanless v. Tatum[154]

Conduct charged	Function	Wrongness
Negligent response to safety complaint	Ministerial	Negligence for Jury

152. 543 S.E.2d 392 (Ga. Ct. App. 2000). In *Tkacik*, the defendant deputy sheriff was responding to an "officer needs help" call when he failed to yield the right of way when entering an intersection without activating his siren. *Id.* at 392-93. The court reasoned that rushing to the aid of a fellow officer is a discretionary act. *Id.* at 393. The court said that the officer's failure to activate his siren constituted an act of negligence, not a deliberate intent to do a wrongful act. *Id.*

153. 529 S.E.2d 626 (Ga. Ct. App. 2000). *Phillips* was a wrongful death action arising out of an intersection collision that plaintiff alleged resulted from negligent failure to inspect a vegetation obscured stop sign and a failure to monitor accident history. *Id.* at 627-28. The court held that the failure to inspect the county road and to monitor the accident history of the intersection were both ministerial in nature, being failures to carry out established policies. *Id.* at 629. The court held that no one showed that the defendant county road officers were negligent. *Id.*

154. 536 S.E.2d 308 (Ga. Ct. App. 2000). Plaintiff sued for county engineer's negligence in responding to a citizen complaint about safety conditions on a road where plaintiff's daughter was subsequently killed in a single car accident. *Id.* at 309. The court reasoned that the evidence showed the county's established policy for handling citizen road complaints was that the county wrote them down and forwarded them for investigation. *Id.* at 310.The court found that this policy established a ministerial duty to record and investigate, and although defendant may have possessed discretion respecting when to investigate, that did not change the ministerial nature of the task. *Id.* The court held the evidence sufficient for a jury to determine whether the defendant negligently breached his ministerial duty to investigate. *Id.* at 311.

Brock v. Sumter County School Board[155]

Conduct charged	Function	Wrongness
Negligent bus stop safety procedures	Discretionary	Negligence

2001: The court of appeals' official immunity agenda for 2001 featured four cases: a variety of law enforcement scenarios, supplemented by one controversy from the public school classroom.

Carter v. Glenn[156]

Conduct charged	Function	Wrongness
Negligently hiring & retaining officer	Discretionary	Negligence

Roundtree v. Cloud[157]

Conduct charged	Function	Wrongness
Negligent pursuit of fleeing suspect	Discretionary	Negligence

155. 542 S.E.2d 547 (Ga. Ct. App. 2000). Plaintiff's child was struck by a car at a school bus stop while waiting for the bus, and plaintiff sued school officers who failed to make check-ride procedures, failed to forward a report of the stop's dangerous condition, and failed to report the child's prior safety violations. *Id.* at 548, 550-51. As for the transportation director, the court said he had the discretion to determine when to perform an evaluation, and that the determination whether an area is dangerous is a discretionary function. *Id.* at 550-51. As for the school principals, the court said any failure to report past student safety violations, regardless of whether there was a school policy to do so, was a part of supervision of student safety and was discretionary. *Id.* at 551-52. Finally, the court concluded that all of the alleged ministerial acts related to supervision, control, and monitoring of student safety and constituted discretionary functions. *Id.* at 552. The court also noted the absence of any allegation of actual malice. *Id.* at 550.

156. 548 S.E.2d 110 (Ga. Ct. App. 2001). Plaintiff alleged that an on-duty police officer raped her. *Id.* at 111. She sued the mayor and police chief alleging that they negligently hired and retained the officer and failed to perform adequate background checks. *Id.* at 111, 113. The court found the operation of a police department, including training and supervising of its officers, constituted discretionary functions. *Id.* at 113. The court said there were no allegations of malice or intent to cause injury. *Id.*

157. 551 S.E.2d 770 (Ga. Ct. App. 2001). There. a suspect fleeing the two defendant officers struck plaintiff's van, and plaintiff argued that the officers' pursuing actions were negligent. *Id.* at 771. The court summarily held that the trial court was correct in holding official immunity before considering the issue of causation. *Id.* at 771-72.

City of Atlanta v. Heard[158]

Conduct charged	Function	Wrongness
False arrest and malicious prosecution	Discretionary	Negligence

Butler v. McNeal[159]

Conduct charged	Function	Wrongness
Classroom injury to child	Discretionary	Negligence

2002: The court decided a total of nine subject cases during 2002, arising from a rather wide array of governmental contexts. Moreover, the year's decisions yielded less-than-typical uniformity in results.

Norris v. Emanuel County[160]

Conduct charged	Function	Wrongness
No repair or warning of road conditions	Discretionary	Negligence

158. 555 S.E.2d 849 (Ga. Ct. App. 2001). Plaintiff, the owner of an auto shop, alleged that city detectives conducted a flawed investigation in deciding not to scrutinize certain evidence and deciding to arrest the plaintiff (who was later acquitted) for receiving stolen property. *Id.* at 851. The court said that regardless of whether the detectives' decisions were flawed, those decisions remained discretionary, thereby rejecting plaintiff's contention of ministerial functions. *Id.* at 853. The court noted that there had been no finding of malice. *Id.*

159. 555 S.E.2d 525 (Ga. Ct. App. 2001). There, plaintiff alleged physical injury from a classroom discipline episode in which, he believed, the defendant teacher pulled his chair out from under him. *Id.* at 526. Defendant denied such actions on her part. *Id.* The court said it was immaterial whose version of the facts was correct because the teacher was exercising her discretionary authority to monitor, supervise, and control the children in her school. *Id.* at 527. The court viewed the record as failing to show that the teacher acted with actual malice or with the intent to injure the student. *Id.*

160. 561 S.E.2d 240 (Ga. Ct. App. 2002). In *Norris*, storms washed out a road intersection, and the edge of the shoulder gave way under plaintiff's truck. *Id.* at 242. Plaintiff sued two county road officials for failure to repair the intersection or to warn of the dangerous condition. *Id.* The court said the storms had damaged several roads, forcing defendants to determine how to allocate county resources, a discretionary decision. *Id.* As for a statute requiring traffic-control devices, the court said that making the "as necessary" decision required the exercise of discretion. *Id.* at 244. Plaintiff had only alleged negligence on the part of the officers. *Id.* at 241.

Happoldt v. Kutscher[161]

Conduct charged	Function	Wrongness
(1) Noncompliance with road ordinance requiring adequate drainage	Discretionary	Negligence
(2) Noncompliance with road ordinance requiring grading standards	Ministerial	No Negligence

Anderson v. Barrow County[162]

Conduct charged	Function	Wrongness
Negligent operation of rescue vehicle	Discretionary	Negligence

Conley v. Dawson[163]

Conduct charged	Function	Wrongness
Conspiracy in accident investigation	Discretionary	Negligence

161. 567 S.E.2d 380 (Ga. Ct. App. 2002). Plaintiff, injured at an intersection between a subdivision road and a county road, sued the subdivision review officer for negligence in failing to inspect and require the road to meet a county ordinance mandating an adequate drainage system. *Id.* at 381. The court said the review officer exercised personal deliberation and judgment in determining whether the standard had been met, and his determination was discretionary in nature. *Id.* at 383. The plaintiff also sued the subdivision review officer for failing to ensure that the road met an ordinance that provided for maximum horizontal grades of specified percentages, vertical curves of minimum lengths, and required that the road be graded to its full width. *Id.* The court said the ordinance's grading instructions were sufficiently clear and definite to call for the exercise of a ministerial duty. *Id.* at 383. Although official immunity did not protect the review officer with respect to the grading requirements, the court held that plaintiff presented no evidence that the accident resulted from the officer's failure to insure that the road met those requirements. *Id.* at 384.

162. 568 S.E.2d 68 (Ga. Ct. App. 2002). There, decedent was killed when she pulled into the path of a county rescue vehicle driven by defendant, a volunteer fireman responding to a two-car head-on collision. *Id.* at 69. The court reasoned that the officer's decision to rush to the scene of the accident lay within his discretion, and he was thus in the performance of a discretionary function when he struck decedent. *Id.* at 70. Plaintiff did not allege that defendant acted with malice or intent to cause injury. *Id.* at 71.

163. 572 S.E.2d 34 (Ga. Ct. App. 2002). Decedent died in a collision with a truck, and plaintiff charged the defendant police officer with conspiracy in investigating the accident due to the officer's business relationship with the owner of the truck. *Id.* at 35-37. The court said nothing about the discretionary-ministerial point. *Id.* at 37-38. The court found the record insufficient to uphold plaintiff's charge of actual malice based on conspiracy and held that the charge of the officer's improper motives would require speculation and assumptions not justified by the record. *Id.*

Tittle v. Corso[164]

Conduct charged	Function	Wrongness
Investigation with actual malice	Discretionary	No Malice

Clark v. Prison Health Services, Inc.[165]

Conduct charged	Function	Wrongness
(1) Failure to perform inmate documentation work	Ministerial	Negligence for Jury
(2) Failure to alert concerning mental health referral	Ministerial	Negligence for Jury
(3) Failure to implement referral process	Ministerial	Negligence for Jury
(4) Failure to inspect and monitor cell	Ministerial	Negligence for Jury

164. 569 S.E.2d 873 (Ga. Ct. App. 2002). Plaintiff sued defendant deputy sheriff for his conduct in an investigation of plaintiff on the road at night. *Id.* at 875-76. Plaintiff charged the officer with profanity, threats, and slamming him against a car, and alleged that these acts constituted actual malice. *See id.* The court said the officer was performing an official discretionary function in investigating a "shots fired" call. *Id.* at 876. The court divided four-to-three on the issue of actual malice with the majority holding that the acts alleged, while undesirable, did not show a deliberate intent to commit a wrongful act, as opposed to an effort to restrain and investigate. *Id.* at 877-78. The dissent contended that the evidence was sufficient for a jury to make a determination on actual malice. *Id.* at 879.

165. 572 S.E.2d 342 (Ga. Ct. App. 2002). Plaintiff sued because her son committed suicide while in the county jail. *Id.* at 344. She sued a number of county officers, including the classification officer for failing to complete required documentation when placing the prisoner in lock-down. *Id.* at 345, 347. The court said that some of the classification officer's allegedly negligent actions were governed by clear, definite, and certain instructions, and thus constituted ministerial acts. See *id.* at 347. Plaintiff alleged the booking sergeant negligently failed to alert the counselor to the mental health referral. *Id.* at 346. The court said that clear, definite, and certain policies governed the booking sergeant's functions, leaving no room for making judgments. *Id.* at 344-48. Plaintiff alleged that the mental health counselor negligently failed to implement the health referral procedure after receiving plaintiff's telephone message about her son's condition. *Clark*, 572 S.E.2d at 348. The court said that established jail policies clearly and unequivocally required the counselor to make an assessment after receiving a call from a family member. *Id.* Plaintiff also alleged that the floor officers negligently failed to follow jail policies regarding inspecting and monitoring inmates. *Id.* The court said that the jail policies required the implementation of clear and certain duties rather than the exercise of personal judgment. *Id.*

Bateast v. DeKalb County[166]

Conduct charged	Function	Wrongness
False arrest	Discretionary	Malice for Jury

Anderson v. Cobb[167]

Conduct charged	Function	Wrongness
False arrest and malicious prosecution	Discretionary	No Malice

Gamble v. Ware County Board of Education[168]

Conduct charged	Function	Wrongness
(1) Conspiracy in a disciplinary action	Discretionary	Negligence
(2) Intentional injury of reputation	Discretionary	Malice for Jury

2003: The proliferation of official immunity cases in the court of appeals continued through 2003. Although a majority of the claims arose out of law enforcement efforts, both high-speed chases and schoolroom controversies maintained their presence as well.

166. 572 S.E.2d 756 (Ga. Ct. App. 2002). Plaintiff alleged that defendant police officers arrested her for failing to produce her name and date of birth even though they knew that she had done so prior to the arrest. *Id.* at 756-58. The court inferred that the officers performed a discretionary function in making the stop and investigating. *See id.* at 757. Under plaintiff's testimony, said the court, the officers proceeded to make the arrest even though they knew she had not committed the crimes, thereby intending to do a wrongful act. *Id.* Thus, whether the officers acted with actual malice was a question of fact for the jury. *Id.*

167. 573 S.E.2d 417 (Ga. Ct. App. 2002). Plaintiff sued county detective for effecting an arrest warrant for simple battery, after which plaintiff was arrested, tried, and acquitted. Plaintiff alleged that defendant pursued the warrant without sufficient cause. *Id.* at 418. The court said that the decision to seek an arrest warrant is a discretionary act. *Id.* at 419. The court reasoned that even assuming the truth of plaintiff's charges that defendant could have investigated further before seeking the warrant and that she followed poor procedures, those assertions did not show a deliberate intent to commit a wrongful act or to harm so as to defeat official immunity. *Id.*

168. 561 S.E.2d 837 (Ga. Ct. App. 2002). Plaintiff challenged her son's school bus suspension for alleged sexual misconduct and sued a large number of school officials. *See id.* at 839-41. She alleged that the school superintendent, the assistant principal, and the transportation director used improper procedures when they participated in the disciplinary action. *See id.* at 840-41. The court said that supervising and disciplining school children are discretionary acts. *Id.* at 843. The court deemed that none of the allegations showed malicious, willful, or wanton conduct. *Id.* at 843. The plaintiff alleged that the bus driver and the bus monitor intentionally made up misconduct charges to injure her child's reputation and character as a part of an on-going feud. *Id.* The court made no mention of the acts being other than discretionary. *See Gamble*, 561 S.E.2d at 843-44. The court said that the specific allegations of intentional and arguably malicious conduct might rise to the level of actual malice so to defeat official immunity. *See id.* The claims presented a justiciable issue. *Id.* at 844.

Aliffi v. Liberty County School District[169]

Conduct charged	Function	Wrongness
Exposure of student to danger	Discretionary	Negligence

Smith v. Bulloch County Board of Commissioners[170]

Conduct charged	Function	Wrongness
Negligent operation of ambulance	Discretionary	Negligence

Standard v. Hobbs[171]

Conduct charged	Function	Wrongness
Negligent high-speed chase	Discretionary	Negligence

169. 578 S.E.2d 146 (Ga. Ct. App. 2003). A large roll of paper fell upon plaintiff's child and killed her. *Id.* at 147. Plaintiff sued defendant school teacher for violating school policy by sending her child, unsupervised, to the garage, a place of danger. *Id.* The court said that the teacher was exercising her discretionary authority to monitor, control, and supervise the children in her classroom when she sent plaintiff's child to get the paper in the garage. *Id.* at 148. The court said there was no evidence that the teacher acted with actual malice or with actual intent to harm the child. *Id.*

170. 583 S.E.2d 475 (Ga. Ct. App. 2003). A county ambulance responding to a 911 call struck plaintiff. *Id.* at 476. The court said that even if the county driver's use of light and siren and choice to respond to the call were all limited by county protocol, the process of driving the ambulance on such a call was not a relatively simple, specific duty, and it involved personal judgment in determining how best to proceed. *Id.* at 477. The plaintiff only alleged negligence on the part of the driver. *Id.* at 477-78.

171. 589 S.E.2d 634 (Ga. Ct. App. 2003). A person suspected of armed robbery, whom the defendant county deputy was pursuing, struck plaintiff when emerging from her driveway. *Id.* at 635. Rejecting plaintiff's argument of ministerial duties, the court found the county's written standard operating procedures for high speed chases to contain guidelines and boundaries and prohibit certain conduct, but the court placed responsibility for the decision inherent in high speed chases with the individual officers. *Id.* at 637. The officer's balancing process in following the guidelines was the hallmark of discretionary action, the court said, and the officer must make a choice regarding a course of action. *Id.* at 638. The court said that no evidence in the record suggested the officer acted with actual malice or intent to injure. *Id.*

Smith v. Chatham County[172]

Conduct charged	Function	Wrongness
Pursuing truck into intersection	Discretionary	No Malice

Harvey v. Nichols[173]

Conduct charged	Function	Wrongness
(1) Negligent operation of jail	Discretionary	No Malice
(2) Negligent cell placement	Discretionary	No Malice
(3) Failure to monitor jail cell	Ministerial	No Proximate Cause

172. 591 S.E.2d 388 (Ga. Ct. App. 2003). County police pursued a pick-up into an intersection where it struck plaintiff's car. *Id.* at 389. Rejecting plaintiff's argument of ministerial functions, the court read the county's procedures to place responsibility for engaging the pursuit on the officer and to set forth various factors for the officer to consider. *Id.* at 391. The court said that the decision to make the pursuit clearly required more than mere execution of simple duties, and the officer was performing discretionary acts. *Id.* Rebuffing the plaintiff's argument that the officers exhibited reckless disregard for the safety of others, the court said that conduct did not equate with actual malice necessary to defeat official immunity. *Id.*

173. 581 S.E.2d 272 (Ga. Ct. App. 2003). Plaintiff sued for a prison inmate's suicide, charging the sheriff with negligence in operating the jail. *Id.* at 275-76. The court said that the operation of a police department was discretionary as opposed to ministerial. *Id.* at 276. The court rejected plaintiff's argument of actual malice on grounds that nothing with which the plaintiff charged the sheriff rose to the level of actual malice or the actual intent to harm. *Id.* at 277. Additionally, plaintiff sued the jail manager for negligence in cell placement of the inmate. *See id.* The court said the manager's decision to place the inmate in a cell was based on interviews, reviewing notes, his examination of the facts, his experience, and his best judgment. *Id.* The court held that his decision was discretionary. *Harvey*, 581 S.E.2d at 277. The court said that nothing with which the plaintiff charged the manager amounted to actual malice. *Id.* Plaintiff also sued the detention officers for negligently inspecting and monitoring the cell. *Id.* The court said the jail had established policies and procedures governing surveillance and that the detention officers' acts of following these policies were merely the exercise of a specific duty and were ministerial in nature. *Id.* Although the detention officers enjoyed no official immunity, the court nevertheless held that the inmate's suicide was not a probable consequence of their failure to monitor his cell. *Id.* at 278.

Middlebrooks v. Bibb County[174]

Conduct charged	Function	Wrongness
(1) Lack of policy on inmate suicides	Discretionary	Negligence
(2) Lack of directions on monitoring	Discretionary	Negligence
(3) Negligent monitoring of inmate	Discretionary	Negligence

Reese v. City of Atlanta[175]

Conduct charged	Function	Wrongness
False arrest and malicious prosecution	Discretionary	Negligence

Reed v. DeKalb County[176]

Conduct charged	Function	Wrongness
False arrest and malicious prosecution	Discretionary	Negligence

174. 582 S.E.2d 539 (Ga. Ct. App. 2003). Plaintiff sued for suicide of a prison inmate, alleging that sheriff and officers maintained inadequate policies regarding inmate suicides. *Id.* at 543. Rejecting plaintiff's contention of ministerial functions, the court said that jail operation and policies are matters of a discretionary nature. *Id.* at 543-44. The court said there was no showing of actual malice on the part of these officials. *Id.* at 544. Plaintiff also sued police lieutenants for failing to give clear directions on monitoring suicidal inmates. *Id.* The court said decisions required of these officers demanded the exercise of judgment and discretion. *Id.* There was no evidence of malice. *Middlebrooks*, 582 S.E.2d at 544. Finally, plaintiff sued deputies for failing to check inmate more frequently and for failing to enter his cell. *Id.* at 545. The court said these officers were allowed to exercise their discretion in making such determinations. *Id.*

175. 583 S.E.2d 584 (Ga. Ct. App. 2003). In *Reese*, defendant police officer investigated plaintiff for scalping tickets, told him to move on, and arrested him for criminal trespass when he refused to do so. *Id.* at 584. Later the charges against plaintiff were dismissed. *Id.* at 585. The court said that both the investigation and the arrest were discretionary functions and that even if the decision to arrest was flawed, it was still discretionary. *Id.* The court found no evidence that the officer acted maliciously or with the intent to injure. *Id.*

176. 589 S.E.2d 584 (Ga. Ct. App. 2003). Defendant police officer arrested plaintiff school principal for interfering with the arrest of two students for fighting at school. *Id.* at 586. The warrant against the principal was later dismissed. *Id.* The court said the decision to effect a warrantless arrest is generally a discretionary act requiring the officer's personal judgment and deliberation, and this is true even though the officer operates on a mistaken belief. *Id.* at 587. The court said that even assuming the officer's actions in arresting the principal were misguided, there was no evidence of actual malice. *Id.* at 588.

Meagher v. Quick[177]

Conduct charged	Function	Wrongness
Non-completion family violence report	Ministerial	Proximate cause for Jury

2004: Completing the decade under review, in 2004 the court of appeals considered two school controversies and two cases involving county roads. In each, the court held the official immunity doctrine to prevail.

Cooper v. Paulding County School District[178]

Conduct charged	Function	Wrongness
Mishandling a malfunctioning gate	Discretionary	Negligence

177. 594 S.E.2d 182 (Ga. Ct. App. 2003). *Meagher* was an action related to the beating death of a child. *Id.* at 183-58. The defendant police officers had earlier responded to a 911 call at the premises, talked with individuals present, and concluded that no child abuse had taken place. *Id.* The officers did not complete a family violence report as required by state statute. *Id.* at 184. The court said that the statute was explicit in requiring preparation of a report whenever police investigate an incidence of possible family violence. *Id.* at 186. Observing that the statute further specified the precise contents of the report, the court said these acts were simple, absolute, and definite, requiring merely the execution of a specific duty, and were therefore ministerial. *Id.* Thus, the officers enjoyed no official immunity. *Meagher*, 594 S.E.2d at 186. The court then held that genuine issues of fact existed on whether the failure to file the report proximately resulted in the child's injuries and death. *Id.* The court held that no evidence showed that the officers intended to cause the child's death. *Id.* at 187.

178. 595 S.E.2d 671 (Ga. Ct. App. 2004). In *Cooper*, plaintiff sued a school principal for injuries received when the school's malfunctioning traffic gate struck plaintiff's car causing injury to her and her children in the car. *Id.* at 671. Rejecting plaintiff's argument that the principal's handling of the broken gate was a ministerial function, the court said this was a situation in which the principal exercised his discretion in the maintenance of school facilities, and he was thus immune from the alleged negligence. *Id.* at 672. The court noted all parties agreed that the principal did not act with actual malice or intent to cause the injury. *Id.*

Harper v. Patterson[179]

Conduct charged	Function	Wrongness
Failure to supervise paraprofessional	Discretionary	Negligence

Brown v. Taylor[180]

Conduct charged	Function	Wrongness
Failure to maintain hazardous road	Discretionary	Negligence

Banks v. Happoldt[181]

Conduct Charged	Function	Wrongness
Failure to maintain stated road width	Discretionary	Negligence

2. *Collectively*

With the decisional essentials of each case in each year of the decade extracted, a few collective reflections may assist in bringing some degree of order to the court of appeals' vast volume of official immunity activity. Spanning the entire period during which the concept has held constitutional status, the official immunity activity reveals a judicial effort at acclimation.[182] The court has labored

179. 606 S.E.2d 887 (Ga. Ct. App. 2004). This case was an action by mentally disabled children alleging that the defendant special education teacher negligently allowed a paraprofessional to molest them. *Id.* at 889-90. Plaintiffs argued that because state law requires classroom teachers to supervise paraprofessionals in their classrooms, defendant's negligent failure to do so constituted a ministerial function. *Id.* at 891. The court said that plaintiffs were actually alleging a failure to supervise in such manner as to protect them from molestation; thus, the case was controlled by the rule that supervision of student safety is a discretionary function that entitled defendant to immunity. *Id.* at 892. The court said plaintiffs' only charge was one of negligence; there was no allegation of actual malice or intent to cause injury. *Id.* at 891.

180. 596 S.E.2d 403 (Ga. Ct. App. 2004). Plaintiff's vehicle overturned after running over a six-inch drop on the broken pavement at the shoulder of the road. *Id.* at 404. Plaintiff sued county road employees, alleging they were negligent in failing to inspect and repair the hazardous condition. *Id.* The court said there was no formal or written county policy on road maintenance, and there was no evidence that the employees knew of the condition or that anyone instructed them to inspect or repair the area. *Id.* at 405. Thus, the acts upon which liability was premised were discretionary. *Id.* at 404.

181. 608 S.E.2d 741 (Ga. Ct. App. 2004). In *Banks*, the county's "minimum standards" required a road width of at least 20 feet, and plaintiff alleged defendants' failure to comply. *Id.* at 745. The court said that the defendant officials must exercise discretion in determining how to spend resources on county roads. *Id.* at 746. The court said that plaintiff had alleged no malice or intent. *Id.* at 744.

182. *See generally supra* Part III.A.

intensively to implement the supreme court's abbreviated (but emphatic) lesson plan for assimilating the 1991 constitutional amendment.[183]

Initially, a more precise indication of the litigated subject matter is in order. Although, as previously tabulated, the court decided roughly 63 material cases over the ten-year period, some of those cases litigated more than one act or course of conduct. That is, some plaintiffs targeted more than one erring act on the part of the defendant official, or charged more than one officer with different acts. In those instances, the court of appeals determined the character of each act, as well as its alleged wrongness.[184]

Table IV—Number of "Acts" Classified 1995-2004

Year	Total Cases	Total Acts
1995	4	4
1996	6	7
1997	4	5
1998	14	15
1999	1	1
2000	8	8
2001	4	4
2002	9	14
2003	9	13
2004	4	4
Totals	**63**	**75**

183. *See id.*
184. *See id.*

As the Table depicts, in deciding 63 cases over the decade, the court of appeals actually classified a total of 75 acts or endeavors by defendant officers. In some cases, the same official was sued for more than one act; [185] in others, multiple defendants were charged with different acts.[186] In resolving the litigation, the court was called to characterize each act as either a discretionary or ministerial function.[187] Only then could the court reach a determination on the issue of official immunity.[188] In more accurately assessing the court's decade-long performance, therefore, that assessment should emphasize the total 75 acts requiring judicial classification.

The focus next shifts to the court's characterizations of the 75 targeted acts. Employing the supreme court's interpretation of the constitutional amendment, the court of appeals sought to designate each act as either a discretionary or a ministerial function. Under the mandated approach, only the discretionary function enjoys official immunity from negligence liability.[189]

Table V—Judicial Classifications of Acts 1995-2004

Year	Discretionary Function	Ministerial Function	Total
1995	4	0	4
1996	7	0	7
1997	3	2	5
1998	11	4	15
1999	1	0	1
2000	6	2	8
2001	4	0	4

185. *See, e.g.*, Happoldt v. Kutscher, 567 S.E.2d 380 (Ga. Ct. App. 2002).
186. *See, e.g.*, Coffey v. Brooks County, 500 S.E.2d 341(Ga. Ct. App. 1998).
187. *See, e.g.*, *Happoldt*, 567 S.E.2d 380; *Coffey*, 500 S.E.2d 341.
188. *See, e.g.*, *Happoldt*, 567 S.E.2d 380; *Coffey*, 500 S.E.2d 341.
189. *See, e.g.*, Gilbert v. Richardson, 440 S.E.2d 684 (Ga. 1994).

2002	9	5	14
2003	11	2	13
2004	4	0	4
Totals	**60 (80%)**	**15 (20%)**	**75**

Overwhelmingly, therefore, the court of appeals advanced the cause of official immunity. In 80% of its classification endeavors over the past ten years, the court found the targeted act to be discretionary in character. Via those conclusions, the court relieved the vast majority of local government officers or employees appearing before it from responsibility for their negligent conduct. Unless guilty of actual malice or intent to injure, those defendants bore no burden for the injuries they allegedly caused.[190] As a potential evasion of the sovereign immunity bar, the action against local government officers or employees left much to be desired.

Attention next narrows to the 60 total occasions on which the court classified a local government officer's act as constituting a discretionary function. Unless those occasions may themselves be classified, little circumspection can be brought to bear on the judicial exercise under scrutiny. At the risk of over-broadness, therefore, the following Table groups into general categories the acts characterized by the court as discretionary functions.

Table VI—General Categories of Discretionary Functions 1995-2004

Discretionary Function	Number of Acts so Classified
Operation of school	4 (7%)
Supervising and monitoring students	17 (29%)
Driving motor vehicle	9 (15%)

190. *See id.*

	Law enforcement	14 (24%)
	Road work	6 (8%)
	Paramedics	1 (2%)
	Malicious investigation &	9 (15%)
Totals	**7 Categories**	**60 Acts (100%)**

Although admittedly bordering on over generalization, the Table organizes into seven categories the 60 acts classified as discretionary functions over the past decade. It was through these categories that the court of appeals operated to confer official immunity upon local government officers sued for offending conduct. Acts falling within these categories, the court typically reasoned, required the officer's investigation of facts and making a personal deliberation or judgment. Those qualities, the court concluded, involved the officer's exercise of discretion in performing the act.[191] As for volume, it may be noted that well over half the acts classified as discretionary fell into the categories of "school cases" and "law enforcement."

Illustrating, however, that the process is far less absolute than the above Table seems to indicate, the effort now devolves to categorizing acts which the court characterized as ministerial functions. Although comprising a distinct minority (only 20%) of the acts evaluated, these are the instances rejecting official immunity for the officer's negligent conduct. These are the tantalizing instances that hold out hope for plaintiff's success and thus drive the volume of case filings.

191. *See, e.g.*, Morgan v. Barnes, 472 S.E.2d 480, 481 (Ga. Ct. App. 1996); Stone v. Taylor, 506 S.E.2d 151, 163 (Ga. Ct. App. 1998); Payne v. Twiggs County Sch. Dist., 501 S.E.2d 550, 553 (Ga. Ct. App. 1998); Schulze v. Dekalb Co., 496 S.E.2d 273, 276 (Ga. Ct. App. 1998).

Table VII—General Categories of Ministerial Functions 1995-2004

	Ministerial Functions	Number of Acts so
	Road work	7 (47%)
	Law enforcement	8 (53%)
Totals	**2 Categories**	**15 Acts (100%)**

The Table organizes into two general categories the 15 acts the court classified as ministerial functions over the past ten years. Acts within these categories, the court often emphasized, were simple, clear, and decreed by absolute rule, leaving no room for the officer's exercise of discretion or judgment. These were the acts, accordingly, for which liability could not be defeated merely by the officer's plea of official immunity. Rather, having surmounted that initial issue in the case, the injured plaintiff advanced to the effort of demonstrating the officer's negligence.[192] Although by no means assured of a recovery, plaintiff at least proceeded farther than sovereign immunity might have permitted in an action against the local government itself.[193] These are the categories, therefore, rewarding plaintiff's attorney for his litigation strategy.

Disconcerting, of course, is the fact that the two general categories yielding conclusions of ministerial functions also appear among the seven general categories the court characterized as discretionary functions.[194] Road work and law enforcement thus emerge as the categories requiring the most meticulous analytical delineations.[195] What particular acts falling within these two categories propel the court of appeals to diametrically opposing characterizations?

192. *See, e.g.*, Shulze v. Dekalb Co., 496 S.E.2d 273, 276 (Ga. Ct. App. 1998); Phillips v. Walls, 529 S.E.2d 626, 629-30 (Ga. Ct. App. 2000); Wanless v. Tatum, 536 S.E.2d 308, 309 (Ga. Ct. App. 2000); Clark v. Prison Health Servs., Inc., 572 S.E.2d 342 (Ga. Ct. App 2002).

193. *See supra* Part II. *Compare, e.g.*, Seay v. Cleveland, 508 S.E.2d 159 (Ga. 1998), *with Clark*, 572 S.E.2d at 342.

194. *See supra* Tbls. VI, VII.

195. *See supra* Tbls. VI, VII.

Under the general road work category, the previous tables reveal, the court characterized a total of six acts discretionary and seven acts ministerial.[196] The former included such acts as failing to repair or warn of storm damage to roads, failing to level road shoulders, and noncompliance with an ordinance requiring adequate drainage. In each instance, the court stressed the degree of personal evaluation, judgment, and reasoning left to the individual officer by either the situation or the ordinance.[197] Among the road work acts characterized as ministerial were failing to replace a missing stop sign, failing to report or remove road obstructions, inadequately responding to a road safety complaint, and noncompliance with an ordinance requiring specific road grading standards. In each of those instances, the court emphasized the lack of evaluation, judgment, and reasoning left to the individual officer.[198] Neither the situation nor the material ordinance permitted the officer to debate the necessity of carrying out the basic act required.

The tables show that under the general law enforcement category, the court characterized a total of 14 acts as discretionary and eight acts as ministerial.[199] The former included erroneously effecting an arrest, permitting an inmate to escape, misdirecting traffic, negligently hiring and retaining police officers, and incorrectly

196. *See supra* Tbls. VI, VII.

197. For example, in *Coffey v. Brooks County*, the court held that the officer's deciding if and when to barricade roads during heavy rains involved the officer's observation of the roads and his decision regarding proper allocation of available resources–these were all discretionary functions. 500 S.E.2d 341, 346 (Ga. Ct. App. 1998). Again, in *Stone v. Taylor*, the court asserted that examining roads and deciding not to level the shoulders constituted the exercise of discretionary functions. 506 S.E.2d 161, 164 (Ga. Ct. App. 1998). Finally, in *Happoldt v. Kutscher*, the court held that an ordinance requiring the officer to maintain adequate road drainage made it necessary that the officer exercise his personal judgment in determining whether the drainage was adequate–this was a discretionary function. 567 S.E.2d 380, 383 (Ga. Ct. App. 2002).

198. For example, in *Brown v. Hines*, the court declared that once the officer received notice that the stop sign was missing, his duty to replace it was ministerial. 495 S.E.2d 592, 593 (Ga. Ct. App. 1998). Again, in *Lincoln County v. Edmond*, the court said that any discretion enjoyed by the officer as to the manner of removing the downed tree from the road did not change the fact that the tree must be removed. 501 S.E.2d 38, 41 (Ga. Ct. App. 1998), That removal, said the court, was the performance of a ministerial act, not a discretionary one, regardless of the elements of discretion that may be present during execution of the mandatory job. *Id.* at 42. Finally, in *Wanless v. Tatum*, the court held that county policy established an absolute duty to record and investigate safety complaints, and failure to do so constituted a ministerial function. 536 S.E.2d 308, 310 (Ga. Ct. App. 2000),

199. *See supra* Tbls. VI, VII.

operating the jail. These all constituted acts which, in the circumstances, the court found to involve evaluation, choice, and deliberation.[200] Among the acts characterized as ministerial were faulty classification of jail inmates, negligent booking of inmates, failure to perform jail inspection, failing to refer inmate for mental health treatment, and noncompletion of a family violence report. The conduct charged, the court emphasized, arose in contexts rendering the acts relatively clear, simple, and sufficiently mandatory to eliminate the element of choice.[201]

The general categories of road work and law enforcement thus illustrate how confusingly close the discretionary versus ministerial call can be. The absence of a definite policy or rule on the act at issue often augurs for a discretionary determination, but the presence of such a policy or rule does not guarantee a conclusion of ministerial. The "devil" of distinction dwells not simply in the details; it lies rather in the court's view of those details in the case. For better or worse, judicial perspective does not yield to charts and graphs.

Analysis now refocuses exclusively on the court's discretionary function classifications for the decade, and inquiry turns to the remaining consideration in reaching an official immunity conclusion. A defendant officer engaged in a discretionary function, that is to say, enjoys official immunity from liability only for the wrongness of

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200. For example, in *Lowe v. Jones County*, the court held that effecting an arrest involved many elements of discretion. 499 S.E.2d 348, 350 (Ga. Ct. App. 1998). In *Parrish v. Akins*, the court reasoned that the mandatory function of supervising prisoners does not remove the carrying out of the supervision from being a discretionary function. 504 S.E.2d 276, 278 (Ga. Ct. App. 1998). In *Carter v. Glynn*, the court classed the operation of a police department, including decisions on training and supervision, as a discretionary function. 548 S.E.2d 110, 113 (Ga. Ct. App. 2001). Finally, *Harvey v. Nichols*, held that managing a jail featured actions based on examining facts, experience, and best judgment, and were thus discretionary. 581 S.E.2d 272, 276-77 (Ga. Ct. App. 2003).

201. For example, in *Harvey*, the court emphasized that two jail detention officers followed established procedures, executed specific duties, and thus functioned in a ministerial fashion. 581 S.E.2d at 277. Again, in *Clark v. Prison Health Services, Inc.*, the court held that inmate classification and booking was done under clear, definite, and certain procedures, as was referral to a health counselor once a call was received from the inmate's family. 572 S.E.2d 342, 347 (Ga. Ct. App. 2002), As for the two floor officers, the court held, their duties required no exercise of personal judgment. *Id.* at 348. Finally, in *Meagher v. Quick*, the court focused upon a state statute mandating that officers who investigated a report of family violence must complete a written report the details of which report the statute specified. 594 S.E.2d 182, 186 (Ga. Ct. App. 2003). Even though defendant officers concluded that no violence had occurred, said the court, the report requirements were simple, absolute, and definite, and required merely the execution of a specific ministerial duty. *Id.*

negligence.[202] The former tables took note of the court's wrongness standard in each case.[203] Of the 60 acts categorized as discretionary, how many were judged by a negligence standard?[204] How many of those acts, that is to ask, enjoyed official immunity by virtue of the court's decision?

Table VIII—Discretionary Acts Subjected to Negligence Standard

Year	Discretionary	Negligence Standard
1995	4	4
1996	7	6
1997	3	3
1998	11	11
1999	1	1
2000	6	6
2001	4	4
2002	9	5
2003	11	8
2004	4	4
Totals	**60**	**52 (85%)**

As the Table reveals, 85% of the acts deemed discretionary were then subjected to a wrongness standard of negligence, necessarily assuring a conclusion of official immunity. Once the court

202. *See supra* Part I.

203. *See supra* Part III.A.

204. That standard may have resulted either from the fact that the plaintiff alleged only negligence, or from the fact that the court itself decided there was no greater wrong than negligence in the case. *See, e.g.*, Reese v. City of Atlanta, 583 S.E.2d 584, 585 (Ga. Ct. App. 2003); Harper v. Patterson, 606 S.E.2d 887, 891 (Ga. Ct. App. 2004). Either way, once the function was held discretionary, it necessarily qualified for official immunity, a concept that covers negligent acts.

determined that plaintiff's alleged harm resulted from a discretionary act, therefore, it had decided the case's pivotal issue. Overwhelmingly, that characterization of the defendant officer's conduct disposed of the litigation.

The remaining discretionary act dispositions may be shown as follows:

Table IX—Discretionary Acts Subjected to Actual Malice Standard

Year	Discretionary	Actual Malice
1995	4	0
1996	7	1
1997	3	0
1998	11	0
1999	1	0
2000	6	0
2001	4	0
2002	9	4
2003	11	3
2004	4	0
Totals	**60**	**8 (13%)**

This Table illustrates the precise time frame enveloping the remaining 13% of the discretionary acts. Of the eight acts held discretionary and then subjected to an actual malice standard, seven occurred in 2002 and 2003. For the total eight acts depicted, the plaintiff had alleged the defendant officer's actual malice; thus, the court's characterization of the act did not necessarily resolve the outcome. Rather, the court must then decide the issue of wrongness to determine whether official immunity was to operate.

The court's wrongness decisions may be summarized as follows:

Table X—"Discretionary Acts"—Actual Malice Decisions

Year	Malice	No	For Jury	Total
1996	0	0	1	1
2002	2	2	0	4
2003	0	3	0	3
Totals	**2**	**5**	**1**	**8**

Table X features the discretionary acts subjected to the court's substantive consideration on the issue of wrongness. Of the total eight acts, only three escaped dispositions in favor of the defendant officer.[205] The remaining five acts, previously declared discretionary, enjoyed official immunity once the court concluded their wrongness did not rise to the level of actual malice.[206]

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205. The three cases: (1) In *Johnson v. Gonzalez*, plaintiff's auto was struck by defendant officer answering an emergency call and the court held that the officer's acts, though discretionary, must go to the jury on whether the officer's decision to overtake plaintiff's vehicle without using his lights or siren was merely negligent or constituted a reckless disregard for the safety of others. 478 S.E.2d 410, 412 (Ga. Ct. App. 1996). Later, of course, the supreme court would hold that reckless disregard did not equate actual malice under the 1991 constitutional amendment. *See* Merrow v. Hawkins, 467 S.E.2d 336, 338 (Ga. 1996). (2) In *Bateast v. DeKalb County*, plaintiff charged false arrest and malicious prosecution for defendant officers' conduct in falsely charging her with giving a false name and date of birth. 572 S.E.2d 756, 756-57 (Ga. Ct. App. 2002). Although a discretionary act, said the court, plaintiff's evidence was sufficient for the jury to infer that the officers arrested plaintiff knowing that she had not committed the crime, thereby intending to do a wrongful act. *Id.* 758. (3) In *Gamble v. Ware County Board of Education*, plaintiff charged defendant school officers with intentional injury to his child's reputation, and the court said that given plaintiff's specific allegations of intentionally and arguably malicious conduct, it could not conclude from the pleadings that official immunity would apply. 561 S.E.2d 837, 843-44 (Ga. Ct. App. 2002).

206. The five cases: (1) In *Tittle v. Corso*, plaintiff charged the defendant with conducting an investigation with actual malice, and the court held that the allegations of defendant's using profanity, threats, and slamming did not rise to the level of actual malice. 569 S.E.2d 873, 877 (Ga. Ct. App. 2002). (2) In *Anderson v. Cobb*, plaintiff sued defendant detective for actual malice in seeking an arrest warrant, and the court held the evidence failed to show a deliberate intent to commit a wrongful act. 573 S.E.2d 417, 419 (Ga. Ct. App. 2002). (3) In *Smith v. Chatham County*, the plaintiff alleged defendant officer's actual malice in pursuing a truck into an intersection where it struck plaintiff, and the court held that the evidence did not show defendant's deliberate intention to do a wrongful act. 591 S.E.2d 388, 391 (Ga. Ct. App. 2003). (4) In *Harvey v. Nichols*, plaintiff charged a sheriff with actual malice in operating the jail, and the court held that no actions alleged by plaintiff rose to the level of actual malice

Of the 60 acts characterized over the decade as discretionary, therefore, only three left the court of appeals unprotected by the concept of official immunity. For the surveyed period, the court's classification of the act as discretionary virtually equated a decision against liability. That revelation reaffirms a sobering message to plaintiffs' attorneys.

Reverting once again to the court's total ministerial function classifications for the decade, inquiry focuses upon the remaining analytical facet determinative of the defendant officer's liability.[207] Once the act is classified as ministerial, the concept of official immunity ceases to protect the officer for his negligent conduct.[208] In these instances, then, there is no place for advocacy or treatment of actual malice; mere negligence itself suffices to trigger liability.[209]

The following Table groups the ministerial acts by year of classification and reflects the court's treatment of the negligence issue in each instance.

Table XI—Ministerial Acts—Negligence Issue Disposition

Year	Act	Negligence Decision
1997	Supervising work detail	Negligence
1997	Conducting sheriff's sale	Negligence
1998	Replacing stop sign	No negligence
1998	Sub-grading road	Negligence for jury
1998	Removing downed tree	Negligence for jury
1998	Reporting road storm damage	Negligence for jury
2000	Upkeep of road intersection	No negligence

or evidenced an actual intent to harm. 581 S.E.2d 272, 277 (Ga. Ct. App. 2003). (5) Also in *Harvey*, plaintiff charged a police captain with actual malice in reviewing an inmate's cell placement, and the court held no evidence to indicate defendant's actual intent to harm. *Id.*

207. *See supra* Part I.

208. *See id.*

209. *See id.*

2000	Response to road damage report	Negligence for jury
2002	Sub-grading road	No negligence
2002	Jail inmate documentation	Negligence for jury
2002	Inmate mental health referral	Negligence for jury
2002	Implementing referral	Negligence for jury
2002	Inspecting/monitoring jail cell	Negligence for jury
2003	Inspecting/monitoring jail cell	No proximate cause
2003	Completing family violence report	Proximate cause for jury
Totals	**15 Acts**	**Negligence (2) (13%)** **No negligence (3)** **Negligence for jury (8)** **No proximate cause** **Proximate cause for**

Table XI reveals that the 15 acts initially categorized by the court of appeals as ministerial over the last ten years then received diverse dispositions on the negligence issue. In terms of finality, the court declared only 13% of the acts negligent, while concluding 27% in favor of the defendant officer (20% no negligence and 7% no proximate cause). In over one-quarter of the total instances, therefore, plaintiff was unsuccessful even after obtaining the ministerial classification. Finally, following a substantial majority (60%) of the ministerial act characterizations, the court returned plaintiff to a jury determination on the liability issue (53% on negligence and 7% on proximate cause).

Overall, therefore, in the total ministerial acts of the last decade (15 of 75 acts), plaintiff's success on categorization by no means translated into defendant officer's liability. Rather, the court's disposition of the negligence issue remained as a considerable barrier to the injured plaintiff's recovery.

Finally, a meshing of the court's concluding results might conveniently complete the tabulations. In a total of 63 cases, over a period of ten years, the court characterized a total of 75 acts by local government officers and employees. How many of those characterizations, then subjected to the court's wrongness evaluation, did not conclude in the defendant officer's favor?

Table XII—Total "Acts" Not Concluded in Defendant Officer's Favor 1995-2004

Discretionary Acts	60	Discretionary Acts Not Concluded for Defendant	3
Ministerial Acts	15	Ministerial Acts Not Concluded for Defendant	11
Totals	**75**		**14 (19%)**

As revealed, of the total acts (75) characterized either as discretionary or ministerial by the court of appeals over the past ten years, only 14 failed to conclude in the defendant officer's favor on the wrongness issue (either negligence or actual malice). In those 14 instances, the court either disposed of that issue in plaintiff's favor or at least found sufficient evidence to return the question for trial by jury. Accordingly, it may well be that the jury eventually determined even some of the latter instances in defendant's favor. The sparseness of plaintiff's successes, that is to conclude, may loom even more pronounced than indicated by the final table.

CONCLUSION

As a tactic for avoiding the bar of sovereign immunity, the direct action against local government officers has proved largely ineffectual.[210] Although sanctioned by early English law, the tactic encountered substantial resistance in America, where it was deemed an inverted imposition of responsibility.[211] Much of that resistance eventually coalesced into the officer's enjoyment of official (or qualified) immunity.[212]

In Georgia, the concept evolved from case law to constitutional formulation and then, necessarily, back to judicial interpretation.[213] An account of that interpretation, commencing in 1994, now comprises a ten-year chronicle of intense litigation.[214] The saga reveals a concept of highly confrontational dimensions, extracting inordinate attention from bar, bench, and local governments. It reveals a decade of efforts and errors before the appellate courts.[215]

The Georgia Supreme Court restricted its shaping activity to a minimum.[216] In strikingly few cases, the court ferreted from the constitutional formulation basic prerequisites for the concept's applicability: (1) the plaintiff's suit must target the officer in his individual capacity; (2) the officer's alleged misconduct must involve a discretionary act; and (3) the officer's charged wrong must fall short of actual malice.[217] These prerequisites, moreover, demand the trial court's threshold attention in the case.[218] In every instance before it, the court affirmed the applicability of official immunity.[219]

The task of applying the supreme court's strictures fell to the Georgia Court of Appeals.[220] In each of approximately 63 cases, the

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210. *See supra* Part III.B.
211. *See supra* INTRODUCTION.
212. *See id.*
213. *See id.*
214. *See supra* Parts II-III.A.
215. *See supra* Parts II-III.A.
216. *See supra* Part II.
217. *See id.*
218. *See id.*
219. *See id.*
220. *See supra* Part III.

court largely restricted its analysis to dual decisional essentials: (1) the officer's function, and (2) the wrongness standard.[221] Quantifying those essentials yields a decade's profile on the jurisprudence of official immunity.[222]

The court characterized approximately 75 acts allegedly performed by local government officers over the decade.[223] It found 60 of those acts discretionary, well over half relating to schools and law enforcement.[224] Of the 60 discretionary acts, the court judged 52 by a standard of negligence, thereby assuring a conclusion of official immunity.[225] Of the eight acts subjected to an actual malice standard, the court decided five in the negative.[226] Accordingly, only three of 60 discretionary acts failed to enjoy official immunity.[227]

The 15 acts characterized as ministerial divided almost equally into the general categories of road work and law enforcement.[228] Of the total, the court concluded four in favor of the defendant, two in favor of plaintiff, and returned nine for a decision by the jury.[229] Accordingly, 11 ministerial acts, at most, may eventually have yielded favorable results for plaintiffs.[230]

As revealed, therefore, the court's discretionary versus ministerial exaction operates somewhat unevenly. Although a mandatory policy, rule, or ordinance appears necessary for a ministerial act, the court may then scrutinize the stricture itself for any hint of discretion. An ordinance mandating that shoulders be graded six inches below the road's surface is one thing; an ordinance mandating that shoulders be graded sufficiently to insure adequate surface drainage may be quite another. Conversely, an unqualified mandate that an act be done does not lose its ministerial nature simply because it permits the officer's exercise of discretion in determining how to perform the act. Overall,

221. *See id.*
222. *See id.*
223. *See supra* Tbl. I.
224. *See supra* Tbls. III-IV.
225. *See supra* Tbl. VIII.
226. *See supra* Tbl. X.
227. *See id.*
228. *See supra* Tbl. VII.
229. *See supra* Tbl. XI.
230. *See id.*

the court's exaction decisively favors the finding of a discretionary function.

The court's other decisional essential appears similarly weighted. Actual malice surmounts the civil context in which it is applied and assumes a far more demanding criminal law connotation. Thus, the requisite degree of wrongness is not satisfied by showing defendant's reckless disregard for the safety of others. A specific intent to injure the plaintiff is one thing; a specific intent to perform the act that injures the plaintiff may be quite another. Once again, the court's assessment operates dramatically against a conclusion of actual malice.

Quantified for the entire period in which it has held constitutional status, Georgia's official immunity doctrine has well served its policy goals: preserving the local government officer's independence of action and preventing hindsight review of his judgment. Although those goals may frustrate compensation of a deserving injured citizen, plaintiff's attorney owes reflection upon one preliminary inquiry: Will the initiation of litigation alleviate or compound that frustration?